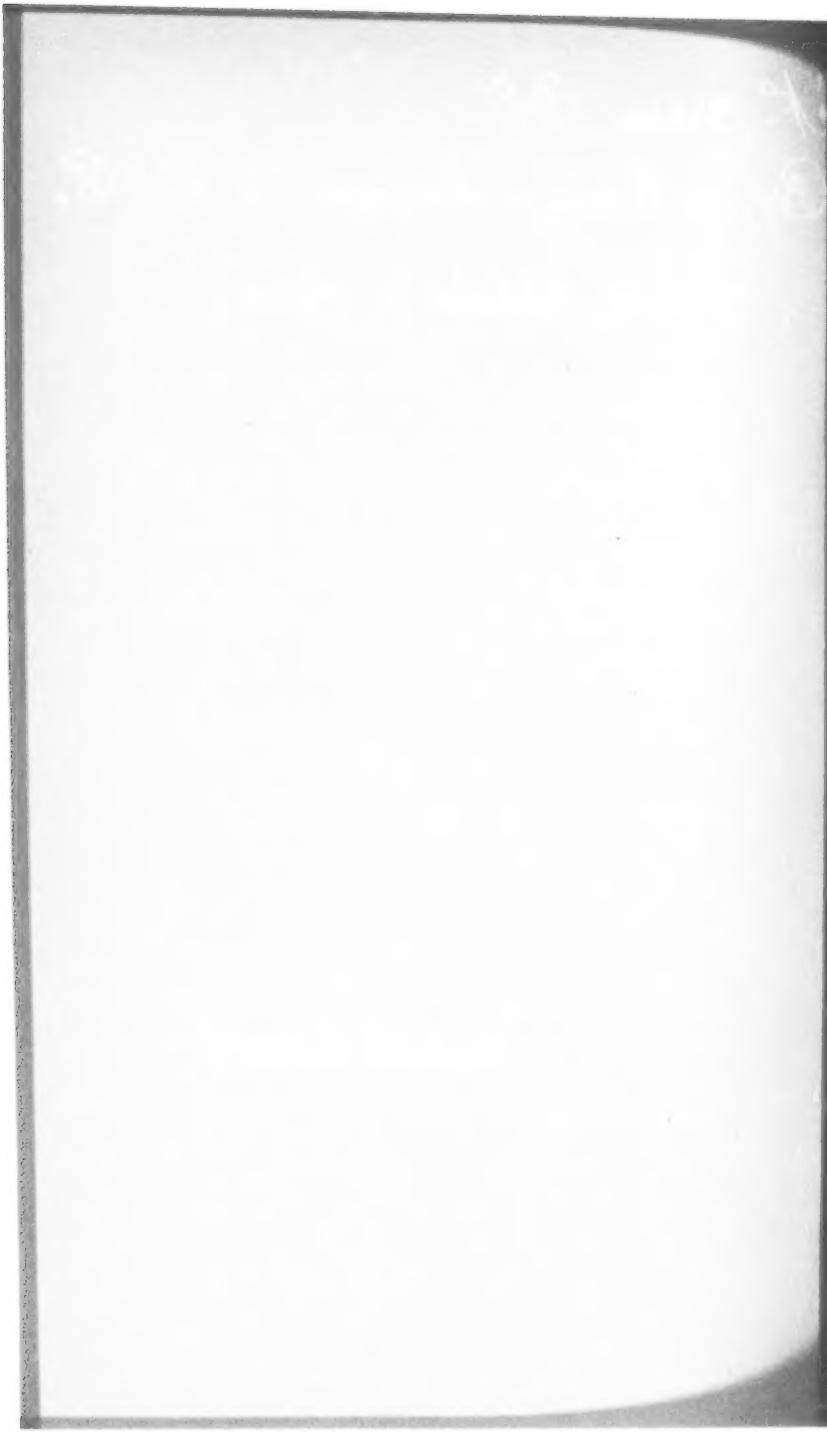

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Br. of Crity v Beckett for D. C.

BRIEF.

Filed April 7, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1899.

No. 244.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.

PLAINTIFFS IN ERROR,

VS

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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Frank J. Crity &
R. C. BECKETT,

ATTORNEY FOR DEFENDANT IN ERROR.

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STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT:

There were two appeals to the State Supreme Court in this litigation. We believe it is the rule of this Court that the writ of error only brings up the proceedings after the first appeal. The plaintiffs, in error, also voluntarily withdrew all their pleadings filed before the mandate. Hence it is only necessary here to give a mere outline of the proceedings previous to that time. The statement of the subsequent proceedings will be much fuller. This is a consolidated suit for the taxes, state, county and municipal, on the part of the Yazoo & Mississippi Valley Railroad formerly belonging to the Louisville, New Orleans & Texas Railway Company, and which became the property of the former by and through a consolidation of the latter with the original Yazoo & Mississippi Valley Railroad Company under the name of the latter on October 24, 1892, and it and the said Illinois Central Railroad Company, the other plain-

tiff in error, are charged in the declarations as being the present owners of the property and liable for the taxes.

Record, pp 5, 71, 99, 611, 623.

The suit is composed of two parts. There were three successive suits by the State Revenue Agent, Wirt Adams, for the taxes of 1892, of 1893 and 1894, combined in one, and of 1895 respectively. The Circuit Court numbers of these suits were 2788, 2916, and 3018, brought respectively on December 7, 1893, December 18, 1894 and January 1, 1896, and these were by a consent order, consolidated on July 21, 1896.

Record p 106

There were two other suits for the taxes of 1896 and 1897, forming the second part, but we will follow this first consolidated suit now. There was a verdict and judgment, partly for the plaintiff and partly for the defendants, on July 25, 1896, from which an appeal was taken by the plaintiff and a cross-appeal by the defendants to the State Supreme Court, which on June 20, 1898, reversed the case on both the appeal and cross-appeal, and remanded it to the Circuit Court with a summary of their holdings.

This summary was under the following provisions of the "Annotated Code of Mississippi" of 1892:

"4352 (1413) * * In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, the opinion of the Supreme Court shall be in writing, stating the reasons upon which the decision is made; and the opinion shall be recorded by the clerk in a wellbound book to be kept for that purpose."

"4381. Copy of opinion certified to court below. In all cases in which the Supreme Court shall reverse the judgment or decree of the court below, and remand the cause to be proceeded with in such court, or remand a cause for further proceedings, the clerk of the Supreme Court shall prepare and certify a copy of the opinion of the Supreme Court, and send it, with the certificate of the judgment or decree rendered in the cause by the Supreme Court, to the clerk of the court from which the cause was brought, or to which it shall be remanded; and the fees of the clerk for certifying the opinion shall be a part of the taxable costs of the case in the Supreme Court; and

the copy of the opinion furnished shall be preserved by the clerk to whom it is delivered, for the use of the court and parties in the case."

On June 27, 1898, the defendants filed a suggestion of errors in the Supreme Court under their Rule 10, which is as follows:

"Petition for Re-argument—Suggestion of Error. Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Monday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause. No extension of the time for making such application will be granted except on account of sickness or other extreme cause. The court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper."

See 70 Miss R, p XXII

This suggestion of error was overruled orally, and handed back to the clerk by the court without any formal order, as is usual in such cases, as the clerk certifies. It was overruled July 1, 1898, and the Court adjourned the same day.

Record, pp 527, 549, and see written agreement on file.

Thereupon the clerk on July 4, 1898, made out and transmitted to the Circuit Court the certificate or mandate from the Supreme Court, with a copy of the opinion or summary of the Court's holdings attached, and this was filed in the Circuit Court while it was in session on said July 4, 1898.

Record, p [redacted]-529, 682-683,

The summary of the Court's holdings does not appear with the mandate on record page 528–529, supra, but it was omitted in making up the transcript by written agreement of the parties to save unnecessary padding of the record.

Record, p 528-683

And the special bill of exceptions shows that it was filed with the mandate.

Record, pp 529–530, 549

In this summary, the Court hold substantially as follows:

I.

On account of the inconsistent compromise verdict, the judgment is reversed both on the appeal and cross appeal.

II.

That the Lambert case is res-adjudicata for the taxes of 1892 on that part of the N J & C Railroad in Adams county, and as to that the Court could not overrule it.

III.

That the Lambert case is not res-adjudicata as to any other property of the N J & C Railroad Company, and not res-adjudicata as to any of the property herein involved.

IV.

That under both the law and the facts, the consolidation of October 24, 1892, created a new company and any alleged exemption was prevented from passing into it by section 180 of the Constitution of 1890.

V.

That the alleged exemption or 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, a reenactment of the 21st section of the Mobile & Northwestern Railroad Company being expressly recited to be irrepealable on its face is void, as violative of sections 13 and 20 of article 12 of the Constitution of 1869, even under the construction in the Mississippi Mills vs Cook case in 56 Miss p 40.

VI.

That said alleged exemption was unconstitutional under the Constitution of 1869, even if it had not been in terms irrepealable, citing St Louis vs Berry, 41 Ark, affirmed by this Court in 113 U S 475, and L & N Railroad Company vs Palmes, 19 Fla 231, affirmed by this Court in 109 U S, 253-254 and the

Mississippi Mills and Lambert cases are expressly overruled.

This all occurred together with, and anterior to the mandate, over all of which we claim this Court has no jurisdiction, which is only before it as a part of the history of the case, and which it has no power to review.

The writ of error could only bring up the proceedings subsequent to the mandate, and they were substantially as follows:

After the decision on June 20, 1898, the plaintiff's attorneys, on June 23, 1898, gave notice to the attorneys for the defendants, that they would insist upon a trial at that term of the Circuit Court, and had the case set for trial on July 4, of which they gave defendants' attorneys due notice.

Record, p 549

I.

Then on July 4, 1898, counsel for defendants appeared in court, and objected to a trial at that term because the Supreme Court had reversed and remanded the case after the commencement of the term of that Circuit Court, and because the Supreme Court had sent down with the mandate only a summary of its holdings, instead of a full opinion, which it had in this summary reserved the right to afterwards make and file. This objection was overruled, and the defendants excepted, but said nothing about the United States Constitution.

Record, p 529-530

II.

The defendants then presented a petition and bond for removal of the case to the Circuit Court of the United States for the Southern District of Mississippi on the ground that "this cause as between the plaintiff and both the petitioners, is one arising under the Constitution and laws of the United States, as your petitioners will now proceed to show." This petition was refused and defendants excepted.

Record, pp 531-543, 544

III.

The defendants then applied for a continuance on account of the absence of whom they claimed to be leading counsel. In

support of this, they introduced an affidavit, and the plaintiff introduced a counter affidavit to the effect that three counsel were present, one of whom had always attended personally to the case, and that the absent counsel had never been present, nor taken any part in it. Thereupon the Court overruled the application, as shown in the bill of exceptions, "for the reason that, in the opinion of the Court, the interests of the defendants are not imperilled by the absence of the counsel referred to in said affidavit, the counsel present being sufficiently able, and fully familiar with the matters and things herein involved." Nothing is said in the affidavit, or application for continuance, or in the bill of exceptions about the Constitution of the United States.

Record, pp 544–550, 550–551

IV.

As shown by a special bill of exceptions, the counsel for defendants then "requested of the Court to grant them time until the morning of Wednesday, the 6th day of July 1898, in which to prepare pleas to meet the new aspect put upon the case, in their opinion, by the decision of the Supreme Court, certified with the mandate herein, and this request the Court granted.

On Wednesday morning the court convened at 9 o'clock, July 6th 1898, and this case being called, all counsel were present, and the court inquired of counsel for defense, if their pleas were ready? Whereupon counsel for defense replied that they were, and produced the same and handed them to the clerk of the Court in the presence of the counsel for plaintiff, and without any objection by them. The clerk thereupon marked the same filed before they were submitted to the Court, or the counsel for the plaintiff and without any leave of the Court to file the same other than as stated above. The counsel for the plaintiff then obtained said pleas from the clerk, after the same had been marked filed by him, and asked time until three o'clock in the afternoon to consider the same, which was granted by the Court.

Whereupon, in the afternoon of said day, the counsel filed

their motion which is herein of record, to strike from the files the 2nd, 3rd, 4th, 5th, 6th and 7th pleas of each of the defendants, which were all the pleas aforesaid.

On this day, being Thursday, the 7th day of July, 1898, a day of said week and term, this case being called, the plaintiff amended his motion by striking therefrom, the figures and letters, 2nd, which occurs in the written third line thereof, between the words, 'files the,' and the expressions, 3rd, 4th, etc., announcing that they withdrew their motion as to the said second pleas of each defendant, and would reply to the same. The defendants then confessed the motion as to the two 7th pleas, stating that they had forgotten what the records herein do show, that at the former term of this court the plaintiff had dismissed this case as to the taxes defended against by said 7th pleas. The court thereupon sustained the said motion as to said 3rd, 4th, 5th and 6th pleas of the said two defendants respectively and struck them from the files. Whereupon the defendants excepted and tendered this, their special bill of exceptions, which is hereby signed and made a part of the record of this cause, this, the 7th day of July 1898."

There is nothing said in this bill of exceptions about any claim being made that this action of the Court in striking out said pleas would be or was any violation of any provision of the Constitution of the United States.

Record p 608-609.

The Yazoo & Mississippi Valley and Illinois Central Railroad Companies each filed separate pleas, but they are mere duplicates of each other, except in the names of the defendants. They appear in the record, pp. 551-578 and 579-606.

The plaintiff took issue on the 2nd pleas.

Record p 609 610.

These second pleas were similar to the first pleas which merely set up a compliance with the requirements of charter, and the plaintiff denied even this, and was willing to go to trial on it, thereby waiving all other questions.

Record p 85-87, 551-554, 578-582.

But the defendants, thereupon, on said July 7th 1898, withdrew all their pleas left on file in the following written withdrawal:

"In this cause, the Court having stricken from the files the pleas of the two defendants, respectively numbered 3, 4, 5 and 6, filed by them in order to meet the new aspect put upon the case by the decision of the Supreme Court herein rendered on the 20th of June, 1898, the said defendants hereby withdraw the joint plea heretofore filed before that decision, and also withdraw the two pleas filed by them respectively at this term, numbered 2, and decline to plead further herein."

Record, p 610

In the meantime after the first trial and judgment on July 25th, 1896, and while the first appeal was pending in the Supreme Court, the Revenue Agent had brought two other suits on December 18th 1896, for the taxes of 1896, and on December 24th 1897 for the taxes of 1897.

Record, p 611-618, 622 629

And on July 8, 1898, these two suits numbered 3059 and 3142 were consolidated with the other consolidated cause by the following consent order:

"On the 21st day of July 1896, causes numbered 2783, 2916, 3018, the suits of the plaintiff against defendants for the taxes of the years 1892, 1893, 1894, 1895 respectively, were consolidated, and after that were proceeded with as one case under said number 2788, and now by consent of all parties, said consolidated cause, embracing said three cases, is further consolidated with cases numbered 3059 and 3142, the suits of plaintiff against defendants for the taxes of the years 1896 and 1897 respectively, and hereafter all of said suits shall proceed as one suit under said number 2788, and it is ordered that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases, with the proper changes in dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896, 1897. This order is made to save the expenses and inconvenience of separate pleadings and trial in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, proceedings and pleadings were all separate. This order, at the request of all parties, is entered as of the 4th day of July 1898, and shall take effect as of that date, at which date the same was made."

Record, p 610-611

Thereupon on the same day, July 8, 1898, a judgment NIL DICIT was entered, the material parts of which are as follows:

"This day came on to be heard this cause, the same embracing cases No 2788, 2916, 3018, 3059, 3142, heretofore consolidated, and the plaintiff and defendants appeared by their respective counsel, and the defendants, the Yazoo & Mississippi Valley and the Illinois Central Railroad Companies, withdrew each and all of their joint and several pleas on file, not including, however, the pleas which have been stricken out by the Court, and said nothing further in bar of this action; it is therefore considered, and so ordered and adjudged that the plaintiff have judgment nil dicit against the defendants for the amounts sued for in said consolidated cause," etc. etc.

Record, p 629-630

The striking out of the 3rd and 7th pleas above mentioned, is not made ground of complaint in the assignment of Errors either in the State Supreme Court or in this Court, but only the striking out of the 4th, 5th and 6th pleas.

Record, p 683-684, 703-704

These 4th, 5th and 6th pleas were substantially as follows:

I.

The 4th plea set up the exemption, or 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, which was a re-enactment of the 21st section of the charter of the Mobile & Northwestern Railroad Company, and section 13 of article 12 of the Constitution of December 1, 1869, which is in these words: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals."

They then set up that at the April term 1878, the Srpreme Court of the State in the case of the Mississippi Mills vs Cook, 56 Mississippi Reports, held and determined that this provision of the Constitution did not prohibit the legislature from granting exemptions from taxation, but only irrepealable exemptions, and this construction had been followed in subsequent decisions, and acquiesced in by all departments of the government,

and that the charter of March 3, 1882, was granted and accepted by the Louisville, New Orleans & Texas Railway Company under this construction, (record p 558-560) and has never been repealed by the legislature, (record p 565-566) but that the Supreme Court of Mississippi in this case, on the first appeal had "held and adjudged on June 20, 1898, that said section 13 of article 12 of the Constitution of 1869 meant that the property of corporations for pecuniary profits should be actually taxed, and not merely subject to taxation, at the will of the legislature; that the said 21st section of the said Mobile & Northwestern charter, and said section five, of the said act of 1882 were void AB INITIO, and the case of the Mississippi Mills vs Cook aforesaid, was expressly overruled, and all of the subsequent cognate cases aforesaid were overruled by necessary consequence, including said Taylor case. It was farther adjudged that the said consolidation of 1892 operated to extinguish both of the consolidating companies, and not by way of merger, and created a new corporation subject to section 180 of the Constitution of 1890, and the said Lambert case was also expressly overruled, wherefore the said privilege of section five, of the act of 1882 would not have come to said defendant, the Yazoo & Mississippi Valley Railroad Company, even if the said section had not been void under the Constitution of 1869 aforesaid;" record page 565, and "that this suit by the plaintiff and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts," and of the 14th Amendment.

Record, pp 566 567, 594 et seqr.

II.

The 5th pleas plead the said Lambert case, being the case of the Natchez, Jackson & Columbus Railroad Company vs Lambert, 70 Miss. 779, as res-adjudicata.

Record, pp 570 571, 598-599

III.

The 6th pleas plead the Lambert case and other previous cases back to and including the Mississippi Mills case as stare

decisis, and that those cases together with the action and acquiescence of the State officers and tax collectors, constitute an estoppel.

Record, pp 576 577, 604-605

An appeal was taken to the State Supreme Court, and among other grounds it was assigned for error.

5th. That the court below erred in trying the case at its June term 1898 and erred in trying it without the full opinion of the Supreme Court, "the combined effect of which was violative of the 14th Amendment to the Constitution of the United States as being a deprivation of the property of appellants without due process of law."

"6th. That the court below erred in overruling the motion of the appellants to remove the cause into the Circuit Court of the United States for the Southern District of Mississippi."

8th. That the combined effect of the action of the court below in trying the case at its June term, 1898, and in trying it without the full opinion of the Supreme Court, and in overruling the application of appellants for a continuance was violative of the Fourteenth Amendment of the Constitution of the United States, as being a deprivation of the property of appellants without due process of law.

9th, 10th, 11th. That the court below erred in striking out the 4th, 5th and 6th pleas of the defendants respectively.

Record p 683-684.

IT IS NOT AVERRED THAT THE ACTION OF THE COURT BELOW IN STRIKING OUT THOSE PLEAS DEPRIVED THE APPELLANTS OF ANY RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

Among other grounds, the plaintiffs in error assign in this court:

14th and 16th. That the State Supreme court erred in denying the 5th and 8th assignments of error, supra.

15th. In overruling the application to remove the cause into the Circuit Court of the United States, in and for the Southern District of Mississippi.

17th, 18th and 19th. That the Supreme Court erred in holding that the Circuit Court committed no error in striking out the 4th, 5th and 6th pleas "because the same presented no defense to this action."

We deny that the Circuit Court made any such ruling or that the Supreme Court decided any such thing, in the sense here attempted to be set up, as that the pleas, as an original proposition, or within themselves, if pleaded at the proper time, would have presented no defense to the action. To show this we will quote the motion to strike out and opinion of the Supreme Court, the material words being italicised by us. That part of the opinion of the Supreme Court is as follows:

"The petition for removal of the cause to the Federal Court was properly denied. The decisions of the United States Supreme Court cited in the briefs of counsel for appellee put this at rest."

K C R R Co v Daughtry 138 U S 303.
Tenn v Bank 152 U S 454.
Galveston v Texas 170 U S 226.

The application for continuance was properly overruled. The Court's action in striking out the special pleas stricken out was correct for the obvious reason that they presented no defense to the action in whole or in part. THE FORMER OPINION OF THIS COURT IN THIS CASE, SETTLED DEFINITELY AND CONCLUSIVELY ALL THE ISSUES INVOLVED, AND THE SPECIAL PLEAS ARE IN EFFECT, NOTHING ELSE THAN AN EFFORT TO HAVE THE CIRCUIT COURT DISREGARD THAT OPINION. THE FUTILITY OF THAT SORT OF PLEADING NEEDS NO COMMENT. THESE MATTERS OF PRACTICE AND PROCEDURE and all the other assignments of error touching matters of practice and procedure were correctly settled by the Court."

Record p 685.

The motion to strike out is here given in full:

1st. Because said pleas are improperly filed.

2nd. Because said pleas are no defense to the cause of action as it now stands before the Court, and no one of them is any defense.

3rd. Because all the defenses set up in said pleas can be set up under their pleas filed prior to the filing of these pleas, and because each of said pleas seek to have this Court review the decision of the Supreme Court.

4th. Because all matters set up in said pleas have been adjudged against said defendants in this case by the Supreme Court.

And the following additional reasons as to said 3rd, 4th, 5th and 6th pleas of each of said defendants respectively, to-wit:

1st. Because (each) one of said pleas is so framed as to prejudice, embarrass and delay a fair trial of this case.

2nd. No one of said pleas is necessary in order to bring the true merits of the controversy fairly to trial.

3rd. Each one of said pleas is so framed as to make the precise nature of the defense intended to be set up so indefinite, uncertain, complicated, and multifarious that it is not apparent what precise defense is intended thereby.

And for the following additional reasons as to said 3rd plea of said defendants, respectively, to-wit:

1st. Because said plea sets up matters of defense that can be set up under the former pleas filed by said defendants, and nothing more.

And for the following additional reasons as to said 4th plea of each of said defendants, respectively, to-wit:

1st. Because said plea seeks to have this Court review the decision of the Supreme Court in this case.

2nd. Because said plea denies the validity of the Supreme Court decision in this case, and calls upon this Court to reverse that decision.

3rd. Because all matters involved in this plea can be set up under the pleas of said defendants, filed prior to the filing of said plea.

4th. Because all matters contained in said plea have been decided by the Supreme Court in this case under said former pleas.

And for the following additional reasons as to said 5th plea of each of said defendants respectively, to-wit:

1st. Because said plea attacks the validity and legal effect of the decision of the Supreme Court in this cause and seeks to have this Court overrule that decision.

2nd. Because said plea sets up the decision of Natchez, Jackson & Columbus Railroad Company vs James W Lambert, tax collector, as a conclusive adjudication against plaintiff's cause of action in this case, when said plea shows on its face that said decision was overruled by said Supreme Court before said pleas were filed.

3rd. Because said plea is offered too late.

And for the following additional reasons as to said 6th plea of each of said defendants respectively, to-wit:

1st. Because said plea attacks the validity of the decision of the Supreme Court in this case, and seeks to have the same reviewed by this Court.

2nd. Because said plea is no defense in this case as it now stands.

3rd Because said plea sets up as an estoppel only such matters as the Supreme Court has overruled in this case before said plea was filed.

4th. Because the State cannot be estopped by the acts of its ministerial officers, and cannot be estopped by the decisions of its courts as to any matters not actually adjudicated in said decisions.

5th. Because said plea is presented too late."

Record, p 606-607

The bill of exceptions, ante, p 6-7 shows that said motion was sustained generally without specifying any particular ground, and the actual order sustaining the motion is as follows:

"This cause came on for hearing upon plaintiff's motion to strike out the 3rd, 4th, 5th, 6th and 7th pleas of the defendant, the Yazoo & Mississippi Valley Railroad Company and the 3rd, 4th, 5th, 6th and 7th pleas of the defendant, the Illinois Central Railroad Company, and thereupon said defendants withdrew said two 7th pleas; and the Court, upon full consideration of the matter, doth order that said motion be, and the same is hereby sustained, and each and all of said pleas (except said 7th) are stricken from the files."

Record, p 608

The plaintiffs in error procured and filed the certificate of the dissenting Chief Justice, as to a Federal question being in-

volved, and in their brief in opposition to our motion to dismiss or affirm, on page 41, undertake to state what the trial court understood "was being done" and what the Supreme Court understood "had been done when it ruled that the pleas presented no defense to the action in whole or in part," and on page 42, talk about us, setting "traps for the unwary."

We will notice these things in the brief, but what we want to do at present is to call the attention of this Court to the fact that the Supreme Court only had power to review what was done in the lower court, and hence that is as far as the power of this Court extends.

May's U S Sup Ct Prac, p 91-92

And if any certificate is proper, it is not that of the Chief Justice, who could only certify at most to things already appearing in the record in the assignment of errors there, but under the broad statements of opposite counsel, the proper certificate would be that of the trial judge who was present and knew all that occurred in the lower court, and to show what he "understood was being done," we have procured and filed his certificate in this case, and now copy the same in full here:

"I, Robert Powell, Circuit Judge of the Seventh Judicial District of Mississippi, in which is included the circuit court of first district of Hinds county, do certify that I was the presiding judge of said court at the June term, A. D. 1898, thereof, and was the judge who heard the motion to strike out the additional pleas in the above styled cause under the court number 2788 in that court, and made the order of July 7th, 1898, striking out the 3rd, 4th, 5th and 6th pleas, and signed the bill of exceptions of that date in reference to the same, and that I am still said circuit judge, and presiding judge of said court, and I further certify that when said motion was sustained, and said bill of exceptions was being prepared, the counsel preparing the same, on behalf of the defendants requested me as said judge to specify some ground of the motion which was sustained in the bill of exceptions, and I, as said judge, expressly refused to do so, stating distinctly that the motion was sustained generally and on all the grounds, and it was so understood by me, and

so distinctly stated at the time it was signed, in open court, and with no other understanding.

Witness my signature this August 9th, 1899.

ROBERT POWELL. (Seal.)

Judge Seventh Judicial District of Mississippi."

POINTS INVOLVED.

I.

That there are only four questions, and they are questions of State practice and procedure, and none of them involve any Federal question.

II.

That if this Court has any jurisdiction to review any of these four questions of practice and procedure, they were all decided correctly.

III.

The unsupported THEORY of the plaintiffs in error that the stricken out pleas, were stricken out "because they presented no defense to this action."

IV.

An answer to other statements and arguments of counsel for plaintiffs in error, which, if unchallenged, may have a tendency to mislead this Court.

I.

That there are only four questions involved, and they are questions of State practice and procedure, which do not involve any Federal question.

All other pleadings being voluntarily withdrawn, this Court can only consider such questions as were not withdrawn, and they are four, as shown by the record.

Of course the whole record of the case comes here, but it is

only that this Court may understand the case from beginning to end, and thus be enabled to act intelligently. But this Court only has jurisdiction of what occurred after the mandate on the first appeal, and the second trial in the trial court, and on the second appeal to the Supreme Court, IN CASE NO 9251, for it is only the rulings and judgment in that last appeal, from which the writ of error is sued out, and it is the settled doctrine of this Court, and of all other courts proceeding according to the course of the common law, that what has been decided and settled in one appeal, is res-adjudicata, and not open to review on a second, or any subsequent appeal.

Union &c v Kirchoff, 169 U S 103
Thompson v Maxwell, 168 U S 451, 456
Great Western &c v Burnham, 162 U S 343-344
Supervisors v Kennicut, 94 U S 498
Stewart v Stebbins, 30 Miss 66
Smith v Elder, 14 S & M (22 Miss) 100
McKinney v State &c, 117 Ind 27-28
Agne v Seitsinger, 104 Iowa 485-486
Long v Perine, 44 W Va 243, 245

Indeed the authorities are so numerous, and so unanimous, that to save space, we refer to 2nd Enc Pldg & Prac, p 373-380 and notes.

And this Court has no more extended jurisdiction in the matter than the Supreme Court of the State, for it is the action of the State Supreme Court only that this Court is called on to review.

May's U S Sup Ct Prac p 91-92, citing among others
Chem Bk v Portage, 160 U S 646, 652
Miller v Texas, 153 U S 538 539, etc etc.

And it was not a case where the record was opened up, and the Supreme Court could try the case de novo, but an appeal in the nature of a writ of error from a judgment in a common law jury trial court, where the jurisdiction of the Supreme Court is limited to a review of the proceedings in the circuit court. The statute simply provides a uniform method of carrying a case up, and calls it all "appeal."

Annotated Code of 1892 Sec 31.

With this point settled then, we claim that there were only four things done by the trial court after the mandate from the first appeal was sent down, which were excepted to, or which were subject to be excepted to, and they were:

A.

The objection to trying the case at the June term, 1898, the the term having commenced before the cause was reversed, or the mandate sent down, and on the summary of the Supreme Court's holdings, in advance of the full opinion.

B.

Refusing the petition to remove the case to the Circuit Court of the United States for the Southern District of Mississippi.

C.

Refusing the application for a continuance.

D.

Sustaining the motion of plaintiff to strike out the 4th, 5th and 6th special pleas.

We will argue these in the above order. Everything else is withdrawn.

A.

The objection to trying the case at the June term, 1898, and in advance of the full opinion. This full opinion when filed on November 22, 1898, did contain one new decision, but otherwise was merely an elaboration, and in our opinion, certainly a very

full and convincing one, of the holdings of the summary. The defendants were not materially concerned with the language used by the Court, but with what it decided, and this they got in the summary.

The objections of the defendants were not based on any provision of the United States Constitution, but exclusively on the State's statutes, as shown by the bill of exceptions; see statement ante, p 5, and the State Supreme Court, in their opinion of November 28th, overruling the motion to strike out this full opinion of November 22, say that "sections 4352 and 4381 of the Code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the Circuit Court on the trial of the case after it was remanded."

Record p 678.

And in the last opinion of February 20th, 1899, they decide that "these matters of practice and procedure and all the other assignments of error touching matters of practice and procedure were correctly settled by the Court," and further, that as this new ground of decision about the repeal of the exemption was not added to the opinion until several months after the second trial in the Circuit Court, it was perfectly obvious that it could not have had, and did not have any influence on that trial.

Record p 685 and 687.

These parties were present in court, and duly heard, and the decision of the court on questions of practice and procedure in the lower courts of the State, raises no Federal question, especially when the attention of the lower court, as is shown by the bill of exceptions here, record p 529, is directed to the State statutes, and not to any Federal question.

Schuyler v Bollong 150 U S 88-90.
Sayward v Denny 158 U S 184-186.
Long Island v Brooklyn 166 U S 685-688.
Iowa Central v Iowa 160 U S 393-394.
Miller v Texas 153 U S 538 539.
Dewey v Des Moines 173 U S 197-201.
Citizens Sav Bk v Owensboro 173 U S 642-644.

175 U.S. 633=635; 643=644.

This is also argued in our brief on the motion to dismiss or affirm, pages 32-34, and is so plain that counsel for plaintiffs in error in their brief on said motion, state on page 45, that they will not urge it here.

B.

The petition to remove case to the Federal Court.

The appearance terms of all the cases had passed, and the application was too late, and there was no color for it.

Kansas City R R Co v Daughtry, 138 U S 303

No Federal question was raised by the plaintiff, and it can not be raised by the defendants in proceedings to obtain a removal. The first and last cases are,

Tenn v Union & P Bk, 152 U S 454

Third St &c v Lewis, 173 U S 457, with about a dozen intermediate cases.

They are cited in our argument on this point in the brief of the argument on the motion to dismiss or affirm, pages 19-22.

And opposite counsel in their brief in opposition to the motion to dismiss or affirm on page 42, state that this point is not now relied on by them.

It has been in fact so often decided by this Court, that it is not now considered by it to raise color for a Federal question, and in the last case but one, they dismiss an appeal from the Circuit Court of Appeals, where the ground of jurisdiction in this Court, like on a writ of error from a state court, is necessarily based on a Federal question. And that appeal is dismissed with a simple reference to Tenn v U & P Bk, 152 U S 454, and Sawyer v Kochersperger, 170 U S 303, at that time the first and last case.

No 336. New Orleans v Warner, 171 U S 685-686

See also Third Street &c v Lewis, 173 U S 457, 460

This Court has also expressly held that the refusal of the state court to permit the party to amend his defective petition for removal, after the appearance term, did not raise a Federal question, and a fortiori, would an application entirely new, raise none, for if a party cannot amend one already on file, it is difficult to see how he could present one de novo.

Stevens v Nichols, 157 U S 370-371

And if the striking out of such a petition raises no Federal

question, the overruling of one, which is substantially the same thing, would not.

Penna Co v Bender, 148 U S 255

In this last case the petition was stricken out on motion.

C.

Refusing the continuance:

The record shows that the defendants were represented by three eminent counsel, present in the Court, one of whom had always personally conducted the defense from the beginning, and that the absent counsel had never been present, nor taken any part in the case, and the conclusion was irresistible that this application was made merely to delay, and there was no principle of courtesy or ethics which justified us in consenting to it, for there was no reason to believe that the absent counsel, if present, could have induced the Circuit Court to overrule the Supreme Court, and the State already had lost, and was daily losing a large amount of interest, as taxes before judgment do not bear interest. Under such circumstances the refusal to continue was imperative.

Garnett v Kirkman 41 Miss 97-99

Means v Bank of Randall 146 U S 629

See also authorities under 1st head, ante

This also being mere matter of practice presents no Federal question as fully shown in our brief on the motion to dismiss or affirm, on pages 32-34, and is virtually conceded by opposite counsel in their brief in opposition to that motion, on page 45, where they say they will not urge it here.

D.

Striking out the 4th, 5th and 6th pleas.

This is also a matter of practice and raises no Federal question.

A bill of exceptions was taken to the action of the court in striking out these pleas, and no Federal question is raised, or claimed in that respect. It is not claimed in the bill of exceptions that the action of the Court deprived the defendants of

their property without due process of law, or that it denied to them the equal protection of the laws, or that it put in force any subsequent law impairing the obligation of any contract. It simply recites the circumstances under which the pleas were filed, or attempted to be filed, and that the plaintiff made a motion to strike them out and "thereupon the Court sustained said motion as to said 3rd, 4th, 5th and 6th pleas of the said two defendants respectively, and struck the same from the files. Whereupon the defendants excepted and tendered this their special bill of exceptions." 176 U.S. 69-92

See ante, p 6-7 and Record p 608-609

It is not claimed in the assignment of errors in the Supreme Court that the court violated any provision of the Federal Constitution in sustaining this motion. The assignments of Error relating to it are the 9th, 10th and 11th, and they are similar except that each refers to a different set of pleas, the 9th to the 4th pleas, the 10th to the 5th pleas, and the 11th to the 6th pleas. They are this way:

"9th. The Court erred in sustaining the motion to strike out the two fourth pleas of the defendants respectively."

Record, p 684

Nothing is said or claimed about a Federal question. The motion in full is in the Statement, ante, p 12-14, and in the record, page 606-607.

The grounds of the motion may all be embraced under five heads:

1st. Because the pleas are filed too late, and improperly filed.

2nd. Under Code of 1892, § 704, they are "so indefinite and uncertain that the precise nature of the defense is not apparent," and "so framed as to prejudice, embarrass and delay a fair trial of the action."

3rd. That the defenses intended to be set up could be set up under the pleas already on file.

4th. That all the defenses attempted to be set up, had been already decided adversely to the defendants by the Supreme Court, and were res adjudicata.

5th. "That said pleas are no defense to the action as it now stands before the Court and no one of them is any defense."

This motion, as the order on it shows, was sustained generally and the bill of exceptions, exclusive of the judge's certificate now on file, shows that it was sustained generally, and no one has a right to confine it to any particular ground of the motion, and much less to go entirely outside of the motion, as the counsel for plaintiffs in error have done on pages 39, 40 and 41 of their brief in opposition to our motion to dismiss or affirm, and state that the motion was sustained "because the pleas presented no defense in whole or in part" and that this was "what the trial court understood was being done."

Slater v Skirving 51 Neb 108.
Hawes v Contra Costa, etc 5 Sawy 287.
Starr v Stark 2 Sawy 603, 642.
Affirmed in 94 U S 477.
Hawes v Contra, 11 Federal Cases 862, 866
Cited in Huntington v Palmer 8 Fed R 450.

We deny that the trial court or Supreme Court ever understood anything of the kind was being done, or that anything of the kind was done. It is very significant that nothing of the sort appears in the assignment of errors in the State Supreme Court, and that it creeps in for the first time in the 17th, 18th and 19th assignments of error in this Court. 175 U.S. 643=644.

The Supreme Court in sustaining the action of the court below uses this language, a part of which we italicize to bring out the point clearly:

"The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. THE FORMER OPINION of this court settled definitely AND CONCLUSIVELY ALL THE ISSUES INVOLVED, and the special pleas are in effect, nothing else than an effort to have the Circuit Court disregard that opinion. The FUTILITY OF THAT SORT OF PLEADING NEEDS NO COMMENT.

THESE MATTERS OF PRACTICE AND PROCEDURE and all the other assignments of error touching matters of practice and procedure were correctly settled by the court."

Ante p 12, Re ord p 685.

The dissenting chief justice makes some kind of a certificate which is distorted from its true meaning and purpose on page 36-37 of that brief, but we deny that it will bear any such construction, and if it did, could not contradict the record, and was unnecessary in this case.

Sayward v Denny 158 U S 183.

Newport v Newport 151 U S 536-537.

And lest this Court could have any lingering doubt on this subject, we have had the certificate of the judge who tried the case, and knows what was done, and understood, filed and printed in the Statement, ante, p 15 to show that an express effort was made to get the judge to specify some particular ground in the bill of exceptions, and that he refused, and actually did sustain the motion on all the grounds, and instead of we or the Court setting a trap for the unwary, somebody is evidently endeavoring to set a trap for the Supreme Court of the United States.

Injured innocence! "A trap for the unwary!"

Now if the Court please, be careful. These gentlemen don't need any guardian.

The point we make here is, that these pleas were not stricken out because that in and of themselves they are no defense to the action, but that under any one, or either, or all the grounds of the motion, they were stricken out under rules of pleading and practice, and that the Supreme Court of the State expressly say "that these matters of practice and procedure * * were correctly settled by the Court."

In our brief of the argument on the motion to dismiss or affirm, we endeavor to show that they were correctly settled by the Court under previous decisions of the Supreme Court of Mississippi, in order to show that their ruling was not arbitrary and without precedent, and counsel for the plaintiffs in error in their brief in opposition to that motion, on page 37, endeavor to show that "it is the statutory right of a defendant in Mississippi to amend his pleadings, and set up new defenses at any time before verdict."

But the difficulty with their argument is that this is the Supreme Court of the United States. Their argument would have

been a very proper and appropriate one to address to the Supreme Court of Mississippi. This Court takes its official knowledge of the local practice in Mississippi through the deliverances of its regularly organized expositor, and not from the briefs of counsel, except as a medium of communication. The Supreme Court of Mississippi has decided that under its rules of practice and procedure these pleas were properly stricken out, and that is conclusive on this Court, and raises no Federal question. It matters not whether their decision was right or wrong.

Stevens v Nichols, 157 U S 370-371

Chemical Bank v Portage, 160 U S 653

It was after the appearance terms of all the cases, and that is all this Court will demand or care to know. They have always decided that a Federal question must be raised at the proper time and in the appropriate way.

Winona &c v Minnesota, 159 U S 540

May's U S Sup Ct Prac p 91-93

Sayward v Denny, 158 U S 184-186

L & N R R Co v Louisville, 166 U S 709

Schuyler v Bollong, 150 U S 88-90

Powell v Brunswick Co, 150 U S 433

Citizen's Sav Bk v Owensboro, 173 U S 643-644

A party is no more entitled to plead it at an improper time, or in an improper way, than any other defense. It is not the business of this Court to upset the orderly rules of pleading and practice in the state courts, and they have never attempted to do so.

The Annotated Code of Mississippi of 1892, prescribes the rules of pleading and practice as follows:

"The summons in actions in the Circuit Court shall be made returnable on the first day of the term, and shall be executed five days before the return day thereof."

Section 3417

"The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court by rule or otherwise shall allow."

Section 722

And in regard to these suits by the State Revenue Agent,

"such suits may be tried at the return term and shall take precedence of other suits."

Section 4194

At the time, the terms of the Circuit Court of the first district of Hinds county were the second Mondays of January and July. Section 626

June was substituted for July by the act of February 5 1898. Laws of 1898, p 72

Of course the appearance terms of the suits for the taxes of 1892, 1893, 1894, 1895 had been long past, and they had been to the Supreme Court and back.

The suits for the taxes of 1896 and 1897 were brought on December 18, 1896 and December 24, 1897, respectively, and the return terms were the second Mondays of January 1897 and 1898 respectively.

There are no summonses in the record, but that is because the Supreme Court Rule 3 provides as follows: "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing, request other matters specified, to be embraced in the transcript, a copy of which request shall be annexed to the transcript."

See 70 Miss., p XX.

The APPELLEE has no control of this, and if the summonses were not issued and served at the proper time, it was very easy for the appellants to show it by a written request to the clerk of the circuit court under the above rule, to include the summonses for 1896 and 1897 in the transcript, and because they did not do so, and because the circuit court under Sec. 156, of the Constitution of 1890 is a court of general and original jurisdiction, all the proceedings are presumed to be correct and regular UNLESS THE CONTRARY BE SHOWN.

Smith vs Central Trust Co. 154 N Y 333.

Cannon v Cooper, 39 Miss. 784.

In order that this Court might not think we had set "a trap for the unwary," we had the clerk of the Circuit Court to send a properly certified copy of these summonses up, and they are now on file and copied in the special record on pages 26-31, and

show that the summons in each case was actually served more than the five days before said second Mondays of January 1897 and 1898, respectively.

Now as to the suits for the taxes of 1896 and 1897, we had been entitled to judgments by default on the face of the record for more than eighteen and six months respectively, and there is in the record no showing whatever for the failure to file pleas at the proper time. We will speak of that hereafter, but what we call the attention of the Court here to is that under the state of the record and without any excuse for the delay, the defendants had no right to file any pleas at all. As the order of consolidation shows, record p 610, we consented that they might have the benefit of pleadings already on file, but did not consent for them to file any new pleadings whatever in those cases, and when the pleadings already on file were voluntarily withdrawn, they stood without any defense, and the action of the court below in refusing to let them file new pleas in either these or the previous case, was a matter of practice and raised no Federal question, and no Federal question in respect thereto is even hinted at, either in the bill of exceptions in the trial court or in the assignment of errors in the Supreme Court.

This Court, moreover, has expressly held that the denial by the trial court of leave to amend the pleadings after the pleading term, so as to raise a Federal question, is a question of of State practice, and raises no Federal question, and that ought to be decisive of this case.

Stevens v Nichols 157 U S 370-371.

To the same effect are:

Iowa Central R R v Iowa 160 U S 393-394.
Long Island v Brooklyn 166 U S 688.
Mexican &c v Pinckney 149 U S 194.
Pennsylvania Co v Bender 148 U S 255.
Belleville v Cox 109 N C 265.
Newburg v Weare 44 O St 604, 609.
Mason v Rolls 130 Ind 260-262.

The plan seemed to be about as follows: On July 5th the defendants requested of the Court until next morning, July 6th, to PREPARE pleas, and the next morning when the court conven-

ed at 9 o'clock, they publicly handed their pleas to the clerk and had him to mark them filed in the presence of the Court and of opposite counsel. Now these pleas cover more than fifty-five printed pages in the record, from page 551 to 606 inclusive. We suppose counsel already had the pleas substantially prepared, and wanted the extra time to put on the finishing touches, and plan a coup-de-tat over night. At any rate it is plain that they were exceedingly anxious to get these pleas on file, but the plan while magnificent in its conception, and a hard dash was made at the finish, failed to pass under the wire by just TWO HEADS.

It got to the very gates, and Rome was only saved by the cackling of her geese, and we are the geese which cackled with our motion.

It aroused the Court to prompt and vigorous action and he with the assistance of the clerk immediately put 'em out and shut the gates.

The 4th pleas especially seem to be a violent assault upon the Supreme Court, almost amounting to a long distance battery, and it was the duty of the judge, as a conservator of the the peace, to strike them out.

Agne v Seitsinger 104 Iowa 485-486.

The case then stood in this condition. They had in two pleas setting up this 21st section, and that under and in compliance with its terms, they had paid out the taxes on the construction debts, made the proper affidavits, got the proper receipts, and had not been able to pay the 8 per cent. dividend, a perfect defense, if the charter provision was valid.

Record p 85, 551, 578.

We filed replications denying the truth of these allegations.

Record p 58, 609.

Here was a square issue on the facts, with all constitutional and Federal questions waived, and rendering the stricken out pleas totally and entirely unnecessary from any point of view whatever, and yet the defendants voluntarily withdrew these pleas, and left us to take judgment nil dicit. This Court has decided that it will not pass on a constitutional question, unless it is necessary.

Baker v Grice 169 US 285, 292.

And when the defendants withdrew their pleas setting up the facts, we cannot see how any Federal question is involved, or how it is possible for this Court to pass on any Federal question. There is none before the Court. 175 U.S. 643-647.

It may be thought strange that the defendants should withdraw these pleas and decline to go to trial on the facts, but if the Court will examine our motion for a new trial on the first trial, it is not so strange as it may seem. The 6th ground of that motion shows that on the former trial one of the jurors by some unfair means forced the other eleven to agree to a compromise verdict. The affidavit in support of that motion is not in this record, and is not material for the present purpose. What we call attention to is that on the former trial the defendants were saved by one juror alone.

Record, p 119-120

With the facts in the record shown hereafter in this brief, this Court can readily appreciate that the defendants stood a better chance to get a delay by a writ of error to this Court, as they have done, than to get any verdict in their favor from a jury on the facts. It was not their fault except in refusing to submit to the inevitable. They had done all that could have been done by any lawyer, and the fault was not theirs that they could not CREATE facts, and the fact that they could not create facts does not entitle them to have Federal questions tried here.

It is true they had made a great and almost unprecedented defense, but we had been slowly advancing with an overwhelming array of facts, until nothing was now left them but Thermopylæ and the Alamo. It was indeed a desperate situation, but to get into this Court they had no recourse left but the forlorn hope of securing a victory before a jury, an apparent impossibility. They claim that if they had made this attempt and succeeded, that like the Persians, we would have found a way 'round over the hills, by making a motion for a judgment NON OBSTANTE VEREDICTO on their pleas.

But as they surrendered the Pass and the Fort there is nothing for this Court to pass on. The jury first, and then victory or death, was their only possible course.

If they had gained a victory before the jury, and we had then been forced to make the motion, the Federal question, if any there was, would have sprung into existence there and then, but as it is there is no question before this Court, except their right to withdraw their pleas and give us a judgment nil dicit, and as the trial court permitted it, and we consented to it, there is nothing before this Court.

II.

The foregoing four questions, we think, are all that are before this Court. We have endeavored to show that none of them raise any Federal question. But if this Court can abdicate its functions as the Supreme Court of the United States, the grandest nation in the world, and come down to the State of Mississippi, and expel her Supreme Court, and sitting not above it, but in its place and stead, decide whether the trial court acted properly and in accordance with the State laws and practice in rejecting the 4th, 5th and 6th pleas, then we will argue the motion to strike out on the actual grounds contained in it, and not on that interpolated into it by the opposite counsel for the first time, in this Court, "because the same presented no defense to this action," as claimed in their 17th, 18th and 19th assignments of error here. We have before denied, and now again deny that there is any such ground in the motion.

The substantial grounds of the motion, which was perhaps too long in order to avoid technical objections, are as follows:

1st. Because the pleas were improperly filed;

2nd. That they were indefinite and uncertain, and calculated to embarrass and delay;

3rd. That the defenses attempted to be set up, could be set up under the pleas already on file;

4th. That the matter of the pleas was all res-adjudicata;

5th. That said pleas are no defense to the action as it now stands, and no one of them is any defense.

For full motion see ante p 12-14.

We could not say they were no defense, when they took is

sue on the 1st and 2nd pleas.

If any one of these grounds was good, then the action of the trial court was right, for the judgment, the bill of exceptions and judge's certificate show they were ALL SUSTAINED.

We will argue them in the above order.

1ST.

Improperly filed and filed too late.

As we have before shown, the pleading terms of all the cases, including those of 1896 and 1897 had passed, and under these circumstances, it is well settled law, that new pleadings cannot be filed without a sufficient showing and leave of the court, and the bill of exceptions, record p 608-609, shows that no leave was asked or obtained in this case. The defendants could either before or after the pleas were stricken out, have asked leave to file them.

Pfeifer v Chamberlain 52 Miss 91.

But this they did not do, and there is nothing on which error can be assigned. This Court can well understand the dilemma. They wanted the pleas in and had no ground on which to ask it.

Shropshire v Probate Judge 4 How (5 Miss) 142.
Wright v Alexander 11 S & M (19 Miss) 411.
Lewis v Black 5 C (27 Miss) 432-434.
Morrison v Gaillard 3 C (25 Miss) 194.
Hunt v Walker 40 Miss 590.
Pool v Hill 44 Miss 306.
Clark v Duke 59 Miss 575, 578.
Hartford v Green 52 Miss 338-339.
Murphy v Frank 69 Miss 403.
Consumer's Ice Co v Cook 71 Miss 886.
Newburg v Weare 44 O St 604, 609.
Mason v Rolls 130 Ind 260-262
Belleville v Cox 109 N C 265.
2 Ency Pldg & Prac p 411-412 & Notes.
1st Series 18 Am & Eng Ency Law p 505 & N 5.

See farther on this, our brief of the argument in support of the motion to dismiss or affirm, pages 14-17.

2ND.

That they were indefinite and uncertain.

It can be pretty well ascertained that the 5th pleas, are pure pleas of res-adjudicata, and expressly plead the Lambert case as such.

Record pp 570-571, 598-599.

And the 6th pleas can reasonably be said to set up the doctrines of stare decisis, and estoppel in pais.

Record, p 577, 604-605

But it is hard to define or tell exactly what the 4th pleas are. The only way to get at it at all, is to quote the language of the pleas themselves on this point. They say "that this suit by the plaintiff, and the said decision of June 20, 1898, are violative of section 10, article 1 of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of a contract" * * and "are violative of section 1 of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws."

Record, p 566-567, 594

There is some surplusage in the 5th and 6th pleas, but each of these 4th pleas contains more than twelve pages of printed matter and recites the whole history of the State, and so many unnecessary and immaterial things, that they are fairly and squarely obnoxious to section 704 of the Annotated Code of Mississippi of 1892, under which that ground of the motion is made, and which is as follows:

"If the allegations of a pleading be so indefinite or uncertain that the precise nature of the complaint or defense be not apparent, or if any pleading be so framed as to prejudice, embarrass or delay a fair trial of the action, the court, on the application of the opposite party, shall cause the same to be made definite and certain, or may strike the same from the files. Irrelevant or redundant matter inserted in a pleading may be stricken out on motion of any party."

They State that the L.N.O.&T. Ry formed in the year 1894, and built the road in the years 1882 = 1884. Record p. 559 = 560.

3RD.

That the same defenses could be set up under the pleas already on file. If this is correct, it was obviously proper to strike out these pleas; for double pleas are both improper and unnecessary.

Green v McCarroll 2 C (24 Miss) 427
Wallace v Scales 7 G (36 Miss) 53
Railway Co v Brooks 69 Miss 168, 184

Opposite counsel in their brief in opposition to our motion to dismiss or affirm, on page 36, claim and indeed are forced to claim the same thing. They say "on the new trial directed by the appellate court, the railroad companies attempted specially to set up and claim the protection of the Federal Constitution, although it was really sufficiently raised under the pleadings as they stood," and on pages 10-11, 28-29, 24 and 33, they try to show that we admit it.

If that is all so, then what kind of a strange position does it place them in? In the language of the brilliant orator in Congress, "Where are we at?"

They claim it, and we admit it, and the trial court verifies it by striking out these additional and unnecessary pleas. Because the Court refused to let them come into court in their elaborate Sunday-go-to-meeting costume, they indignantly pull off their good-enough-every-day-working clothes. Now pray, what kind of a garb they are in?

If the Federal questions were already raised, they are not raised now, for all those pleadings have been voluntarily withdrawn, and it is too late to raise it by any new pleadings.

Union &c v Kirchoff 169 U S 103.
Miller v Cornwall 168 U S 133-135. 176 US. 89 = 92
N Pac R R Co v Ellis 144 US 458. 175 US. 646 = 647.
Citizen's Sav Bk v Owensboro 173 U S 643-644.

See also our brief on the motion to dismiss or affirm, pages 12-13, 17-19.

4TH AND 5TH.

These two grounds of the motion to strike out, namely;

that the matters attempted to be set up are RES-ADJUDICATA in and by the opinion and decision of June 20th, 1898, on the former appeal in this case, and that "the pleas are no defense to the cause of action as it now stands," are substantially the the same, and may be considered together. The only reason we have kept or stated them separately, is to bring out clearly and emphasize the fact that there is no ground of the motion to strike out "because the same are no defense to this action."

Why if the Court please, we took issue on pleas attempting to set up a defense to the action, on the merits

There are two sets of pleas, both sets mere duplicates of each other, except in the names of the defendants, one set being filed by the Yazoo & Mississippi Valley Railroad Company, and the other by the Illinois Central Railroad Company, which was an unnecessary padding of the record, and in the United States Courts is forbidden by the rules promulgated by this Court, but they are in the State Court, and no objection is made on that account.

We took issue on the 2nd pleas, and they and the 7th pleas are withdrawn in the written withdrawals, and there is no assignment of error either in this Court or in the State Court in reference to the 3rd pleas. So the action of the trial court in reference to the 4th, 5th and 6th pleas is all that is in controversy here.

For convenience we will notice these pleas in their reverse order.

A.

The 6th pleas set up the doctrine of stare decisis and estoppel in pais.

Record p 577, 604 605.

B.

The 5th pleas expressly set up the Lambert case, 70 Mis-

sissippi Reports, page 779-791, as res-adjudicata.

Record p 570-571, 598-599.

C.

The 4th pleas expressly set up that "this suit and said decision of June 20th, 1898," are violative of Section 10, Article 1, and Section 1, of the 14th Amendment to the Constitution of the United States.

Record p 566-567, 594.

A.

The 6th pleas set up that the Supreme Court of Mississippi in April, 1878, in the case of Mississippi Mills vs Cook, 56 Miss R p 40 et seqr,, decided that sections 13 and 20 of article 12 of the Constitution of December 1st, 1869, which respectively provided that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," and "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law," did not mean that the property should always be taxed, but that it should always remain liable to taxation, and that this ruling had been followed by many subseqnent decisions, and acquiesced in and acted on by all departments of the State government, until it had become a rule of property, and under it the charter in controversy, being the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, extending to it the provisions of the 21st section of the Mobile & Northwestern Railroad Company charter, was accepted under the amendatory act of March 15th, 1884, and many contracts made since on the faith of that construction, and that it is now stare decisis, and an estoppel against the plaintiff.

Record p 577, 604-605.

This Court has often decided in these tax cases and others that the doctrine of stare decisis, or the overruling of its former

decisions by a state Supreme Court; or the effect of the action or of the acquiescence of the State officials, as an estoppel, are matters of general law, and raise no Federal question, and besides whenever these questions have come before this Court in an original and proper way from the lower courts, it has always decided them exactly like the Mississippi Supreme Court has done in this case.

The first case cited below expressly holds that the doctrine of estoppel is a non Federal one.

Pierce v Somerset Railway 171 U S 648-650.
United States v Kirkpatrick 9 Wheat 720.
Hansford v Davis 163 U S 278.
Central Land Co v Laidley 159 U S 109-112.
Winona &c v Minnesota 159 U S 534-539.
Vicksburg &c v Dennis 116 U S 665.
Yazoo &c v Thomas 132 U S 185.
United States v Tanner 147 U S 663.
State v Brewer 64 Ala 287.
Perry Co v Selma 65 Ala 391.
Delaware &c v Commonwealth 50 Pa St 399.
Hannibal &c v Kansas City 81 Mo 285 and cases.
2 Thompson Comm Law Corp § 2825.

In Wood v Brady 150 U S pages 20-23 this Court say, "assuming for the purposes of this case that there may be vested rights under an erroneous decision, it is carrying the doctrine to an unwarrantable extent to say that the construction placed by the Court on one statute implies an obligation on its part to put the same construction upon a different statute though the language of the two may be similar.

The argument that the language being similar, a like construction should be put upon both acts, is one properly addressed to the state court, but when that court has assumed to distinguish between the two acts, it is not within our province to say that the distinction is not well taken."

This Court has itself repeatedly refused to consider as stare decisis decisions on former acts which were not identical with the one before the Court.

In the much contested and noted cases of Pollock v The Farmer's Loan & Trust Company, the great income tax case, in 157 U S pages 574-579, and the case of Killbourn v Thompson, involving the privileges and powers of the House of Representatives, in 103 U S pages 196-200, and in the Legal Tender cases in 12 Wallace, pages 553-554, and also in the cases of Barney v Winona &c, 117 U S p 228, 231, and Wilmington &c v Alsbrook, 146 U S, p 302, and as far back as Cohens v Virginia, in 6 Wheat, 399, this Court refuse to follow the language in former decisions, because the acts under consideration were not identical with those before the Court.

This Court also hold that the principle of stare decisis does not extend to points in other cases, conceded by counsel, or assumed, and not litigated or contested.

Keokuk &c v Missouri 152 U S 312, 316.

United States v Tanner 147 U S 663.

Cross v Burke 146 U S 83, 87.

Boyd v Alabama 94 U S 645.

Smith v Turner 1 Hughes 373.

See also Field v Malster 41 Atlantic R 1087.

(Md p decided 1898.)

Cohens v Va, 6 Wheat 339, 399.

In the first case, 152 U S 312, this Court say the point which is claimed as an estoppel was "conceded" in the former case, and on page 316, they say as "the tax is defended upon a ground not put in issue there, but conceded by counsel in favor of the company, it is difficult to see how that case can be regarded as establishing any rule of property."

In this case the State Supreme Court acknowledged and applied both of these rules, and showed that many of the acts passed on in former decisions were different from those in the case at bar, and in those that were similar the points decided here were either conceded outright, or assumed and not contested, or else fictitious.

Record pp 514 515, 664-671.

B.

The 5th pleas, that the case of Natchez, Jackson & Columbus Railroad Company reported in 70 Mississippi Reports, pages 779-791, known as the Lambert case, is res-adjudicata.

Record p 570-571, 598-599.

The exemption claimed here is under the 5th section of the original charter of the Louisville, New Orleans & Texas Railway Company, being the act of March 3, 1882, copied in the record, p 41-43, 569.

The Natchez, Jackson & Columbus Railroad was a branch road purchased by the Louisville, New Orleans & Texas Railway Company in 1890, under the act of 1890, (Laws of 1890 p 675) authorizing the purchase, with all the immunities, and the exemption, THE THING, claimed in the Lambert case was an exemption under the charter of the former company and not under the 5th section of the charter of the latter company at all. It is true they were similar, as much alike as two black-eyed peas, but one was under a charter granted to one railroad company in 1870, and the other under a different charter granted to another railroad company in 1882. As well claim that two notes for $1000 each were the same thing because they were written and signed alike, one in 1870 and the other in 1882, or that two silver dollars were the same thing, because they look alike, except that one was made in 1870 and the other in 1882. The difference is strikingly illustrated in this very case. The Mississippi Mills case in 1878 intervened between the two charters, and while the former had to take its chances, the defendants are claiming that the Mississippi Mills case establishes a rule of property in the latter.

It is expressly held by this Court that a decision as to the main line of a railroad is not res-adjudicata as to one of its branches, and the reverse must be equally true.

Wilmington v Alsbrook 146 U S 301-302.

New Orleans v Citizens Bank 167 U S 397.

Southwestern R R Co v Wright 116 U S 231, 236.

As there seems to be some confusion about the matter, it

seems to us that a close attention to the exact point would dispel all this. SEPARATE PRINCIPLES FROM THINGS. RES MEANS A THING.

There are two PRINCIPLES:

1st. That a judgment in a suit on a particular cause of action is conclusive on the same parties, in a subsequent suit, on the same cause of action, not only of what was properly in issue and decided, but of all that might properly have been put in issue and decided.

2nd. That a judgment in a suit on a particular cause of action, is only conclusive on the same parties, in a subsequent suit, on a different cause of action, of what was properly put in issue, and actually decided.

The confusion of thought, it seems to us, arises from not making a clear cut distinction between principles and things. It is res-adjudicata, A THING OR THE THING ADJUDGED, and not a principle or the principle settled, for there never has been and is not now, and never will be, any man, or court, or principality or power, or human agency or tribunal great enough or strong enough to settle any principle whatever until it is settled right.

Principles are indelibly written in the book of nature, and through all her works, by the puissant power and hand of God, and while they may be for a time obscured to mental vision or perception, yet they can never be either altered or obliterated by the puny pen or brain of groping man.

THE THING THAT WAS IN CONTROVERSY in the Lambert case was the exemption or appropriation of taxes in the charter of the Natchez, Jackson & Columbus Railroad Company in Adams county alone, and the two questions which were litigated and decided were that this exemption passed in the sale of said railroad to the Louisville, New Orleans & Texas Railway Company, and also through the consolidation of October 24th 1892, into the present Yazoo & Mississippi Valley Railroad Company, for certain taxes. The further question as to whether a new company was created or not, had no influence whatever with the Court, as we will show hereafter.

The thing in controversy in this suit, the exemption or appropriation in the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, was never in controversy or even involved in that suit. The decision would have been exactly the same if that 5th section had never existed.

But it is involved and in controversy in this suit, on the first appeal as to the taxes of 1892, 1893, 1894, 1895, and in the second appeal as to the taxes of 1896 and 1897 in addition.

For the present it is sufficient to say that neither the property nor exemption in the Lambert case are in any way involved in this suit.

And the conclusive answer to said 5th pleas, is that the Lambert case was not pleaded, nor offered in evidence in this case, before the decision in the first appeal, and it was too late to offer it as res-adjudicata in another case after it was overruled. There would be no use in overruling it.

There are two principles which are now perfectly well settled:

1st. That a former judgment cannot be made available in a subsequent suit about another matter, unless it be pleaded or offered in evidence, as res-adjudicata, and this was not done.

United States v Bliss, 172 U S 321, 326
Land v Keirn, 52 Miss 347-348
Boston v Reed, 23 Colo 523
Brigot's Heirs v Brigot, 49 La Ann 1428
Duchess of Kinston's Case, cited in (1st El) 21 Am & Eng Ency Law, p 258-259, and note 1

This was also decided in this case.

Record, p 656

2nd. That if the former judgment is not pleaded or offered in evidence in the subsequent suit, it like every other defense, which could have been, and was not pleaded or offered in evidence, is itself concluded by the later judgment.

Marsh v Mandeville, 28 Miss 122, 128
Conley v Brayton, 16 Iowa 10, 18
Bateman v Grand Rapids, 96 Mich 441
Freeman on Judgments, section 332

And the State Supreme Court in the decision of June 23th

and November 22nd, 1898, expressly overrule the Lambert case, and in the opinion of February 20, 1899, on the last appeal, expressly hold that the action of the lower court in sustaining the motion to strike out these 5th pleas, was correct.

Record, 513-515, 658-659, 685

It was overruled and was not good for anything except possibly the exact case in which it was rendered, and would probably not be good now in a second suit in that same case.

C.

The 4th pleas, that this suit and the decision of June 20, 1898, violate section 10, article 1, and section 1 of the 14th Amendment to the Constitution of the United States.

Record, pp 566-567, 594

These pleas expressly set out section 13, of article 12 of the Constitution of December 1, 1869.

Record, p 558, 585

And that the Mississippi Mills case decided that this did not render grants of exemption void AB INITIO, but simply made them liable to be repealed at the will of the legislature, and that this construction was accepted and acted upon by all the departments of the government. That the decision was made at the April term 1878, and that the charter of the Louisville, New Orleans & Texas Railway Company was accepted under the act of March 3, 1882, as amended by the act of March 15, 1884 under this construction.

Record, p 558-560, 585-587

That the Supreme Court of Mississippi in the Lambert case, had decided that the consolidation of October 24, 1892 was a merger and did not form a new company and that the exemption was not cut off by section 180 of the Constitution of 1890.

Record, p 560-563, 588-590

That this exemption or appropriation had never been repealed.

Record, pp 561, 566, 589, 593

But that the Supreme Court had, in the decision of June 20, 1898, "held and adjudged" that the exemption was void AB

INITIO, and that the consolidation of October 24th 1892 did form a new company, and the exemption would have been cut off by section 180 of the Constitution of 1890 even if it had not been void AB INITIO as aforesaid, and the Mississippi Mills and coguate cases following it and the Lambert case were all expressly overruled.

Record p 565, 593.

It is then alleged that this suit and that decision of June 20th, 1898 are violative of the Federal constitution as above stated.

These 4th pleas are the pleas which try to, in the famous words of the Hon. Zach Chandler, "claim everything," and yet in the very excess of claiming they fall under the condemnation of that ruler with great possessions, in the Scriptures, when the Savior told him "one thing thou lackest." They forgot to claim the one essential thing to give jurisdiction to this Court, if they were still entitled to the same indulgence as the thief on the cross at that late hour, and that essential thing was they forgot to claim that their so-called contract was "IRREPEALABLE."

And this Court has expressly decided that there can be no irrepealable contract rights, when there is no irrepealable contract.

Louisville v Bank of Louisville 174 U S 444.

In their suggestion of errors on the first appeal, they did for the first time claim that it was not an ordinary exemption, but an appropriation of taxes irrepealable according to its terms and protected by the Federal Constitution.

Record p 521-523. 176 U.S. 83,

And that was too late. 175 U.S. 646 = 647,

Citizens Savings Bk v Owensboro 173 U S 643-644.

But in these new pleas, they actually forgot to make any such claim, and all the others are withdrawn, and the terrific argument in their brief is a very attractive and brilliant pigment thickly put on over a mere figment of a fertile imagination.

It is a waste of time to take to show that these 4th pleas are an attempt to set out what the Supreme Court decided on June 20th, 1898, and then to get the trial court to overrule it, for this is expressly what they say and do. It is due the Su-

preme Court that such pleas should be stricken out on motion, without any formal pleading.

Agne v Seitsinger 104 Iowa 485-486.

This applies to the suits for taxes of 1892-1895 inclusive, which were embraced in the first appeal, and equally as well to the taxes of 1896 and 1897, for there can be no doubt this time that the same parties, and property, and SAME THINGS, are involved, as the consent order of consolidation makes ONE SET OF PLEADINGS applicable to all.

While it is for taxes of different years, it is well settled in such cases, that the decision of THESE THINGS in the one suit is res-adjudicata in the others,

Martin v Lofland 10 S M (18 Miss) 317, 320.
New Orleans v Citizens Bank 167 U S 389-401.
N Pac R R Co v United States 168 U S 48-53.
Stone v Farmers Bank 174 U S 409, 412.
Stewart v Stebbins 30 Miss 66.

On the last appeal, decided February 20th 1899, the State Supreme Court decided the same thing. In this appeal was embraced all the suits, including those of 1896 and 1897, and they say "the former opinion of this Court in this case settled definitely and conclusively all the issues involved and the special pleas are in effect nothing else than an effort to have the Circuit Court disregard that opinion. The futility of that sort of pleading needs no comment."

Record p 685.

And this Court has uniformly decided that the decision of the Supreme Court of a state as to whether a judgment of the courts of that state is res-adjudicata is a matter of either general or local law, and whether made on either ground raises no Federal question.

Phœnix Ins Co v Tenn, 161 U S 184-186.
Wheeling v Wheeling 138 U S 287.
N Pac R R Co v Patterson 154 U S 132-134.
In re Woods 143 U S 202, 206:
San Francisco v Itsell 133 U S 65.
Newport v Newport 151 U S 527. 528.
California v Holliday 159 U S 415-417

Hagar v California 154 U S 639.

See also our brief of the argument on the motion to dismiss or affirm pages 14-15, 33.

In the case of Martin v Lofland, 10, S & M (18 Miss) 317 supra, it is said that when the Supreme Court "have decided a controversy between two judgment creditors as to their respective rights to the proceeds of sales made on their executions, and a subsequent controversy between the same parties as to their respective rights to the proceeds of other sales made under like circumstances under other executions on the same judgments arises, the former decision will be conclusive of the rights of the parties in the latter controversy" which is exactly the same principle here.

And in the other case of Stewart v Stebbins, 30 Miss, 66, it is said that "whatever is necessarily determined by this court in deciding upon the propriety of the judgment of the court below, or in settling the principles to govern the case in any further proceedings to be taken in it, is res-adjudicata, and final and conclusive on the parties, in that or any subsequent suit."

To the same effect see also

Smith v Kernochen 7 How (U S) 198.
Bissell v Spring Valley 124 U S 225.
Tioga Railroad v Blossburg &c 20 Wall, 137.
Lumber Co v Buchtel. 101 U S 638.
Hancock v Singer Mfg Co 42 Law Rep Annated 852,
Same case decided in 1898, N J.
And generally, Bigelow on Estoppel p 37-46.

As we will show hereafter the two cases of McCulloch v Stone, 64 Miss, and L N O & T Ry Co, 68 Miss, were fictitious cases gotten up by said L N O & T Ry Co and not entitled to be used for any purpose, although tried to be used by the plaintiffs in error both in their pleas and briefs.

And right here we wish to protest against opposite counsel continually using the Lambert case either as res-adjudicata or stare decisis for any purpose. That case was ON DEMURRER and the facts were not shown, and besides it was for taxes accruing PREVIOUS to the consolidation. It never showed that at the time of the consolidation of October 24, 1882, there were only $424

shares of the original Yazoo & Mississippi Valley Railroad Company, and of these the Illinois Central R R Co owned 6421 shares, and its officials owned the other 13 shares. Exhibits D and E.

Record p 150.

And it did not show that at that time there were 6000 shares of the Mississippi Valley Company, and that of this number the Illinois Central Railroad Company owned 5910 shares and the other 90 shares belonged to it, but were put in the names of its officials to comply with the charter and enable them to hold office.

Record p 149, 169-170.

And that at the time of the Illinois Central trust of September 1st 1892 it had 37,539 shares of the stock of the said Louisville, New Orleans & Texas Railway Company in the name of said Mississippi Valley Company—see paragraph 4.

Record p 134.

And it did not show that at the first meeting of the stockholders after the consolidation, out of a total of 54,934 shares, the Illinois Central owned 6420 shares in its own name, 44,399 shares in the name of said Mississippi Valley Company to avoid section 197 of the Constitution of 1890, and 112 shares in the name of its officials, making in all a total of 50,931 out of a grand total of 54,934 shares aforesaid.

Record, p 155.

Now if these things had been shown probably the court in the Lambert case, would have had some difficulty, as the court in this case did, in explaining how a railroad company with 48,514 shares of stock could become merged into one with 6420 shares, AND YET GIVE ONE VOTE TO EACH SHARE. The State Supreme Court says it cannot be done, and with all due respect we submit to this Court that such a thing is an inconceivable possibility to any finite mind.

See their opinion, record p 646-647.

But we wish to say further that the decision in the Lambert case was not based on the consolidation of October 24, 1892, being a merger of one company into another else it would have referred to 92 U S 665, but was based singly and alone on

the curious proposition that whether it was a new company or not, the exemption would go into it anyhow, UNLESS FORBIDDEN BY THE LEGISLATURE. They speak of merger and consolidation all through the opinion, as interchangeable terms, and frequently use them together, and without any distinction whatever. For instance they say the charters authorized them to "CONSOLIDATE," and the exemption was not lost by the "merger," in the same sentence.

70 Miss 790.

And on page 789 they say that the consolidation in Railroad Co vs Maine 96 U S 499 did form a new company, but that under the statute certain things in the old companies could not be performed by the officers in the new company, and hence the exemption could not pass, but they expressly say in reference to the Natchez, Jackson & Columbus Railroad Company, "it had the privilege to pay taxes by a prescribed affidavit, which could as well be made by an officer of a NEW COMPANY having control of it, as by one of the Natchez, Jackson & Columbus Company, and on the top of page 790 they say "we approve the doctrine so well put in Tennessee vs Whitworth 117 U S 139, and find it much more applicable to this case than Railroad v Maine, 96 U S 499.

Now if we turn to Tennessee v Whitworth, we will be astounded to see right before our eyes that it expressly finds the consolidation in that case created A NEW COMPANY, and there being no new constitution, that the exemption passed into it under a presumption of law that it would pass UNLESS PROHIBITED BY THE CHARTER.

Tennessee v Whitworth 117 U S 145, 147, 149-150.

And yet this is the case and only case, which the state court approved and applied in the Lambert case. This Court has never called the decision in that case stare decisis, nor applied it in any subsequent case, and yet this Court is now asked to approve the Lambert case, and call it stare decisis in this case.

In reference to the Tennessee vs Whitworth case this Court in Phœnix Ins Co vs Tennessee, 161 U S p 178 say the exemption will not pass by presumption, and on p 181-182, in deference to the learned chief justice who rendered the opinion

in Tennessee v Whitworth, they say that case must be confined to its peculiar facts. In other words, it is not and never was the law, as shown by every decision since. It was simply a slip, based on another slip of Mr. Justice Strong in Central Railroad & Banking Company vs Georgia, 92 U S 665, where he states the same doctrine, that an exemption would pass into a consolidation or merger by presumption.

This, as shown by the court since, is a complete overturning of all the established rules of construing exemption laws.

In that case however, as shown by the court, and also by the Mississippi Supreme Court in this case, the thing done was the merger of another company into the Central Company, under the name AND CHARTER of the Central Company, which still retains its stock, autonomy and charter.

Record p 643.

That decision was all right, because the Central Company was the complaining company, and it was intact, having simply acquired other property by lease, purchase or merger, it was immaterial which, and the decision would have been the same in either case, because it was its original, and not the acquired property that was in controversy.

But the next case, without much argument or other reasons is just simply reversed on the authority of that case, one of the most striking cases of non sequitur we ever saw, and no doubt must have made poor old Aristotle's bones fairly rattle with excitement.

Let us put it in the form of syllogisms.

1st. In a merger between two railroads, where one of them retains its stock, charter and autonomy, it will not lose its exemption.

2nd. In the merger in Central &c v Ga. 92 U S 665, the Central Company did not surrender its stock, charter or autonomy.

3rd. Therefore the Central Company did not lose its exemption from taxation by reason of the merger.

Now take the other case:

1st. In a merger between two railroads, where one of

them retains its stock, charter and autonomy, it will not lose its exemption.

2nd. In the merger in Southwestern Ry Co v Ga 92 U S p 676, the Muscogee R R Co did surrender, and lose its stock, charter and autonomy.

3rd. Therefore the said Muscogee Railroad Company did not lose its exemption in the merger.

You couldn't have gotten even one of his Freshman class to have said "ipse dixit" on any such deduction. The old man would have had him ostracised.

In the one case the merging company WAS NOT DISSOLVED, while in the other it was, and it is expressly claimed and stated as a fact in the pleadings by the plaintiffs in error themselves, that in this case it was the Louisville, New Orleans & Texas Railway Company THAT WAS DISSOLVED in the merger, and the statement in this plaintiff's declarations to that effect were never denied, and it is also found as a fact by the court.

Record p 5, 76, 562, 569-570, 575.

Opinion of the Court, record p 646-647.

We suppose the latter case was just handed in by Mr. Justice Strong, as supposedly embodying the same principles as the one preceding, or possibly there was some agreement of counsel about it taking the same course as the other, or the attention of the Court was probably never called to the difference and distinction, for this Court has always held that where one railroad, although exempt itself, acquires another by purchase, the exemption of the latter does not pass, and what is the difference whether the latter is bought with bonds, money or stock, or all combined; the property of the latter is just merged into the system of the procuring company.

Phœnix Ins Co v Tenn 161 U S 180-181

1 Dauf U S Sup Ct Dig p 1093-1094.

This is only material on opposite counsels' contention that there was a merger. Of course a corporation with 48,514 shares of stock can be merged into one of 6420 shares, but in order to do this it would have to surrender its stock, which was not done here. What we claim here is that the actual things done formed a consolidation, and not a merger, because the

deed of consolidation does not depend on one or the other, but expressly says in the same article that whatever the legal effect of the consolidation, it "is to stand and be effective," record p 14-15, art 1. And a merger of one company with 48514 shares of stock into one with only 6420 is an utter impossibility, WHERE EACH SHARE OF STOCK IS ALLOWED ONE VOTE. It is a mathematical inconceivability.

III.

The unsupported theory of the plaintiffs in error that the pleas were stricken out "because they presented no defense to this action."

We say THEORY, because as we have said before, and repeat now, it has no foundation in fact, and we ask the Court to charge up the additional length of this brief to the counsel for plaintiffs in error, at least in their opinion, for we are forced by their many ingenious assumptions to make this brief much longer than we think ought to have been necessary.

If the pleas had been, as they say, stricken out, "because they presented no defense to this action," we would still claim that no Federal question was raised, and even if there was, there were so many non-Federal reasons for the Court's action even on the merits, that this Court could not say that a Federal question was NECESSARILY involved, and that is requisite to give it jurisdiction. The exact point has been decided by this Court, and should be decisive in this case.

This Court say "it is manifest that it was never contemplated by the framers of the Constitution that this Court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz; whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defense to the claim of the plaintiff."

Iowa Central Railway Co v Iowa, 160 U S 393-394

In this case the facts were that it had once before been

tried by the same judge, and besides the pleadings, the whole of the actual facts was spread out in the record before him, and he was familiar with them all, and besides had them all actually before him, and was placed in a position where he could thoroughly judge of the propriety of permitting these pleas to be filed or to remain on file.

We will now proceed to show this Court that there were in the pleadings themselves, in connection with the record embracing the bill of exceptions, which contained all the proceedings AND EVIDENCE on the former trial, a number of patent and potent non-Federal reasons for the action of the court.

When a party desires to file pleadings out of time, it is necessary to make some excuse for the delay, which was not even attempted here, and also to present the pleadings with the application, or at least before they are filed, so that the court can judge whether they are to be filed for delay only, or whether on their faces they present evidences of good faith, and fairly amount to a prima facie defense.

Hunt v Walker 40 Miss 590.
1st Series 18th Am and Eng Ency Law p 505
and n 5.

Now in their brief in opposition to our motion to dismiss or affirm, the counsel for plaintiffs in error, state that the railroad was built by the Louisville, New Orleans & Texas Railway Company, and in reliance on this 21st section. P 10.

This we also deny, and this and several other fatal defects we will now proceed to point out in and to these 4th pleas. We have already argued the 5th and 6th pleas.

The defects in and to the 4th pleas are:

A.

They show affirmatively that the plaintiffs in error are not innocent purchasers, nor entitled to claim any protection from the doctrine of stare decisis as to the taxes sued for, and we claim that the decision of the Supreme Court was right on the merits.

B.

It affirmatively appears in the pleas and the record, that the railroad was not built by the Louisville, New Orleans & Texas Railway Company.

C.

The pleas and record show that the consolidation of August 12th, 1884, was not authorized by law, and was an attempt to obtain an exemption by fraud.

D.

The record shows that they largely inflated, the so-called construction debts, and the annual interest on the same, without any consideration whatever, and without the knowledge or consent of the State.

E.

The record which was before the court shows that the profits have all the time been sufficient to pay the annual dividend of 8 per cent. on the proper capital stock over and above the proper construction liabilities.

F.

The record shows that the capital stock issued was a pure gratuity, given merely as a bonus with the bonds, and was not entitled to any dividends as against the State.

G.

The plaintiffs in error, when giving in the property FOR TAXATION, gave it in under oath at $5,500.00 per mile for all the

years and could not complain even if the court had taken that as the value when they were trying to ESCAPE TAXATION.

H.

That there is really no construction debt, it having been novated by the $25,000,000 in 4 per cent. gold bonds of the Illinois Central Railroad Company to purchase both debts and stock.

I.

That the questions decided in the summary of June 20th 1898, considered not as res-adjudicata, but as res-nova, are conclusively shown to be rightly decided by the opinion of November 22nd, 1898, leaving out the new question about the repeal, and founded on the later and now settled decisions of this Court itself.

There are other reasons, but we will give seventeen more under the next head, and if that is not enough, we will simply suggest a few more at the end of this brief, and can find still others if the patience ot the Court is not by that time utterly exhausted.

A.

Victims of Stare Decisis.

In order to get the benefit of stare decisis and show how innocent they were and how implicitly they relied on the acquiescence of the state officers, and the Lambert and other previous cases, without notice, they aver that for the five years preceding 1898, the Yazoo & Mississippi Valley Railroad Company "had in its hands in each year a balance of $200,000 of net earnings, as aforesaid, for each of said years, after payment of operating expenses, and taxes and interest on first mortgage bonds," and then speaking of the other bondholders that "by its contract with such bondholders, it had the right to pay off all assessed taxes and would have paid off these taxes, but for such decisions and such constitution."

Record p 562-564, 590-592.

What an unfortunate admission! They evidently overlooked the fact that these were not suits for BACK TAXES at all, but for the CURRENT TAXES of each year as the same fell due, commencing shortly after the decision of the Lambert case on December 7th, 1893, December 18th, 1894, January 1st, 1896, December 18th 1896, and December 24th 1897, and yet they admit that they actually had the money in hand, and could easily have paid the taxes and had a big surplus of more than $100,000 left each year, if they had just known that we were in earnest, and were not prosecuting these suits just for fun. A clear case of notice not only by lis pendens, but actual notice as defendants in these suits. Another remarkable thing in connection with this admission contained in their evidence and annual reports, of which they are for that reason charged with notice is that in 1892 the first mortgage bonds had mounted up to $16,132,000, and has been $16,832,000 since then. Their annual reports show what enormous amounts for the purchase of other railroads, the Bayou Sara, Woodville, Clinton, Natchez, Jackson and Columbus, Riverside Division Special Charter, and for building the Riverside Division, and a branch in Arkansas, widening the guage of the N J & C R R from narrow to broad guage, taking up the 50 pound rails and replacing them with 56 and 62 pound rails, and a multitude of such outside acquisitions and betterments.

1st Annual Report, record p 332-333
2nd Annual Report record p 345, 347-348
3rd Annual Report record p 359, 363-364
4th Annual Report, record p 375-376, 379-382

The Riverside Division Special Charter had been purchased before March 1888, when the first annual report was made, as they already had it then, record p 331, but Maj. Edwards' shows, besides other things, they paid for in first mortgage bonds $1,140,000.

Record p 396.

So the first mortgage bonds issued for all these things were as follows:

Riverside Division, Special Charter $ 1,140,000.00

Third annual report, p 359	2,901,000.00
Fourth annual report, p 375	2,091,000.00
Widening N J & C R R guage, p 375-376	700,000.00
Total	6,832,000.00
Deduct this from the $16, 832,000 leaves	10,000,000.00
Now take the Mississippi part of this, 315–456, and we get	6, 900,787.00

We will now go down the line and show what tricks these people have been playing "with a smile that was childlike and bland."

Mississippi pro-rata $	6,900,787.00
Record p 487, add Tallahatchie branch	497.076.74
	7,397,863.74

Interest at 4 per cent.	$295,914.54
8 per cent. dividend on $5,000,000 stock	400,000.00
	695,914.54

Add Riverside Division $1,063,386.27 to $7,397,863.74, record p 482, and we have $8,461,250.

Interest at 4 per cent.	$338,450
Stock dividend	400,000
	738,550

Now take above interest	$338,450.00
Dividend on 315–456, Mississippi pro rata of stock of $5,000,000 is 3,453,947	276,315.76
	614,765.76
Now take above interest	$338,450.00
8 per cent. dividend on M & V R R Co	187,719.28
Interest and 214–456 part of stock	526,169.28

Now take entire amount	$10,000,000.00
Tallahatchie Branch	497,076.74
	10.497,076.28

Interest at 4 per cent.	$419,883.04
Entire stock	400,000.00
	819,883.04

Add Riverside Division $1,063,386.27 is 11,560,462	462,418.48
Entire stock	400.000.C0
	862,418.48

Now take the entire bonds $16,832,000 at 4 per cent.	$673,280
Entire stock	400,000
	1,073,280

Entire bonds except the $700,000 added after the consolidation of October 24, 1892, $16,132,000 at 4 per cent.	$645,280
Entire stock	400,000
	1,045,280

Interest as above	$645,280
Dividend on original stock $4,547,000	363,760
	1,009,040

Now if we take entire interest as above	$645,280.00
Mississippi pro rata of stock as above	276,315.76
	921,595.76

Or entire interest as above	$645,280.00
M & V R R Co part of stock as above	187,719.28
	832,999.28

We have put this in every possible form. We will speak of it again under head of "E."

Now let us see if the average profits would not pay the dividends and interest on an average in any way we can put it. The net earnings are as follows:

For the year 1889	$ 1,217,662.24
For the year 1890	1,071,426.96
For the year 1891	992,394.63
For the year 1892	1,367,792,91
For the year 1893	1,100,887.75
For the year 1894	922,879.59
For the year 1895	1,078,677.22

We could only get the annual reports previous to 1891, and it will be noticed that in every instance they were made out by Edwards, and yet he had the net earnings in each case much larger than those he, or some one else, fixed up for this case, and it is reasonable that the net earnings since 1891 are larger than those they made out for this case, and they prevented us from getting any statement at all for 1896 and 1897 by withdrawing their pleas, and letting us take judgment. We explain this more fully under the head "E."

B 1st.

The railroad was not built by the Louisville, New Orleans & Texas Railway Company.

It was commenced in 1882, and finished and tracks joined in July or August 1884, as shown by the testimony of J. M. Edwards, vice president and general manager of the railroad company, agent for the construction company, and general superintendent of construction, and not only a witness, but the principal witness, and a willing witness for the defendants.

Record, pp 410, 412, 415, 416, 420, 423

The Louisville, New Orleans & Texas Railway Company was not formed till August 12, 1884. See deed of consolidation.

Record, p 12

So it is plain that the main line of the road was built before it was formed.

In Mississippi it was composed of the Memphis and Vicksburg, and New Orleans, Baton Rouge, Vicksburg & Memphis (hereafter called the Baton Rouge) Railroad Companies.

Record, p 12

The Baton Rouge Company never had any exemption from taxation and was authorized to build all the way from New Orleans via Vicksburg to Memphis, while the Memphis & Vicksburg Railroad Company was only authorized to build from Vicksburg to Memphis.

See charter, record, p 21, 31.

The charters of both railroad companies and the construction company were all owned by the same parties, C. P. Huntington and associates and R. T. Wilson and associates, in the proportion of 60 per cent. to 40 per cent. respectively, and while John A. Grant was nominally president of the Baton Rouge Company, he was merely their chief engineer, and owned no real interest. R. T. Wilson and C. P. Huntington were the promoters and financiers.

Record p 298, 301. 412, 422.

Maj. Edwards states that the road "was built under the charters of the constituent companies," "and after the track was through, or about that time, I think, we consolidated into one company, the L N O & T."

Record p 412.

Maj. R. T. Wilson was president of the railroad companies, and part owner of the construction company, and helped furnish the money to build the road.

Record p 291, 295, 320, 324, 328, 330, 414.

And he does not know what charters it was built under, and yet this Court is asked to know.

Record p 206-207.

The Baton Rouge Company never was exempt from taxation, and was authorized to build the entire road from New Orleans via Vicksburg to Memphis, while the Memphis and Vicksburg Railroad Company originally had this exemption contained in said 21st section, but was only authorized to build from Memphis to Vicksburg through certain designated landmarks.

Record p 21 and 31-32.

Now a party who claims the benefit of exemption from taxation has always been held to bring himself and the property clearly within the terms of the statute, construed strictissimi juris.

Louisville v Bank of Louisville 174 U S 444-445

Yazoo &c R R Co v Thomas 132 U S 185.

And it is not only not shown that the main line was built by the Louisville, New Orleans & Texas Railway Company, but it is affirmatively shown that it was not. The most that could be said would be that the Baton Rouge Company and Memphis & Vicksburg Company built a JOINT ROAD, and there never was any authority for the Memphis & Vicksburg Railroad Company to build any road either jointly or separately below Vicksburg, and no authority for it and the Baton Rouge Company to build any JOINT ROAD above Vicksburg, nor exempting any such JOINT ROAD from taxation.

Not only is there no evidence showing that the landmarks in the charter of the Memphis & Vicksburg Railroad Company were followed, but the only evidence on that part is in the case of Railway Co v Blythe 69 Miss 943-944, where it is shown that a part of the right of way above Vicksburg, in DeSoto county, was made to the EATON ROUGE COMPANY which serves to emphasize the law that it is dangerous to indulge presumptions in favor of exemptions from taxation. Also 64 Miss. 479.

Also Memphis vs Loeb 64 Miss. 713, and recent decision in office, No 5573. Page 16-18- 25. Sept.

But even if it had been proved, which we venture to predict it never can be that the Memphis & Vicksburg Railroad Company, built the part above Vicksburg, the case of N J & C R R Co vs Lambert, 70 Miss, so much relied on by them, decides on page 787 that all exemptions were withdrawn by the act of February 25 1875, Laws of 1875, page 66, and afterwards again by sections 597-608 of the Code of1880, and independently of this decision, they openly admit and assert in the suggestion of errors before the Supreme Court, that "in the year 1880 a new code was adopted in the State of Mississippi, one of the provisions of which subjected all the railroads in the state to taxation."

Record p 519 520.

And this repeal was in full force and effect when this railroad was built, for while the act claimed to authorize the

consolidation was the act of 1882, as amended by the act of March 15th, 1884, it never became effective as the charter of the Louisville, New Orleans & Texas Railway Company until its formation on the 12th day of August, 1884 and AFTER THE RAILROAD WAS BUILT, and had the remarkable peculiarity inserted accidentally, or purposely, it is immaterial which, of only conveying to the consolidated company, the rights and immunities "NOW" on March 3rd. 1882, possessed by the consolidated companies.

Record p 41-42. section 1

So, whatever view we take of this matter, the main line never was exempt. It may be claimed that this 21st section was intended to act retrospectively, as well as prospectively, but to this there are six answers:

1st. That when it was originally granted in 1870, it was granted to a lot of railroads which had not been built.

2nd. The purpose is recited to be to increase the property of the state, and enable it "to greatly increase its revenue, without additional and burdensome taxation on the people," which could not be done by releasing railroads already built and liable to taxation.

Record p 40-41.

3rd. The rule is to so construe a statute as that every part of it shall have some effect, and to construe this section as retrospective, would entirely nullify that part of the first section which gives to the consolidated company all the immunities of the consolidating companies, it evidently being supposed and intended that the consolidation should take place immediately, as section 10 provided that it should be effective of itself unless a dissent was filed within thirty days.

Record p 43.

Lemonius v Mayer 71 Miss 514, 523.

4th. The Supreme Court of Mississippi, in this case, has expressly decided that it was prospective.

Record p 673-674.

5th. If it be admitted that it was retrospective, the plaintiffs in error are in no better plight, for this Court has decided that an exemption from taxation to a structure or railroad,

already erected, is without consideration, and may be modified or withdrawn at pleasure, and is not embraced in or protected by any provision of the Federal constitution, and that this is so, even though subsequent expenses may be incurred or bonds issued on the faith of it, and this would apply as well to an appropriation or donation.

Grand Lodge v New Orleans 166 U S 143
and authorities cited on pages 146-150.
Pearsall v Gr N Ry Co 161 U S 666-668.
Tucker v Ferguson 22 Wall 527, 575.
West Wisconsin R R v Supervisors 93 U S 595.

6th. Such an argument runs itself down to reductio ad absurdum.

Under the amendatory act of March 15th, 1884, it was provided that the act of March 3rd 1882, "be and the same is hereby so amended as to authorize and empower the Memphis and Vicksburg Railroad Company, and any other railroad company OR COMPANIES, incorporated under the laws of this State, to consolidate," &c.

Record p 44.

Now if their argument about being retrospective is carried to its legitimate conclusion, the Memphis and Vicksburg Railroad Company could have consolidated with every railroad "incorporated under the laws of this State," and thereby under said 5th section, rendered every one of them exempt from taxation.

That 5th section meant, and could only have referred to those roads or parts of road which the consolidated road itself should build under its new or consolidated charter, for that is the meaning of the 21st section itself, and is made doubly plain here by the 1st section of the act of 1882, record page 41-42, giving to the consolidated all the immunities and rights of the consolidating companies.

B 2.

Riverside Division.

As to what is called the Riverside Division, that was partly built by, and was purchased from the Memphis & New Orleans Railroad & Levee Company, which had no exemption from taxation. At the time of the purchase it had been constructed, it is admitted as a fact in the case, "between Leland and Huntington and from Wilczinski to Hampton, and thence to Glen Allen."

Record p 297, 394.

Now if the Court will turn to the map between pages 330 and 331 of the record, they will see that the parts constructed by the Louisville, New Orleans & Texas Railway Company were the two branches, one from Coahoma Station to Wilczinski on the north, and the other from Hampton to Rolling Fork on the south, so as to make a continuous loop. There was no authority in the charter of the Baton Rouge Company to build branches north of Vicksburg, and the Memphis & Vicksburg Railroad Company could only build branches on the west side of it, to points on the Mississippi river.

Record p 21 section 1 and p 39 section 18.

By again examining this map, it will be seen that this partly constructed road had already been built to Huntington and Glen Allen, the two points on the Mississippi river.

The Memphis & New Orleans Railroad & Levee Company was authorized under its charter to build its main line in almost any direction and to build branches not to exceed one hundred miles in length.

Laws of 1882, p 876, sec 2

By an amendment to the charter of the Memphis & Vicksburg Railroad Company in 1884 it was authorized "to purchase the whole or any part of any other railroad in this State, and the franchises, rights, immunities and privileges pertaining to the railroad or part of railroad so purchased."

Laws of 1884, p 935, sec 3

And in the act of March 18, 1886, allowing a consolidation between the Memphis, New Orleans Railroad & Levee Company and the Louisville, New Orleans & Texas Railway Company, it is expressly "provided that neither of said railroad companies

shall by this act acquire any rights of exemption from taxation not granted to said railroad companies by their respective charters."

Laws of 1886, p 721

There was no authority whatever to build these two ends to this Riverside Division except under the charter of the said Memphis & New Orleans Railroad & Levee Company, and yet against these two positive acts of 1884 and 1886 it is claimed that this Riverside Division is exempt.

See authorities cited in, and Wilmington v Alsbrook 146 U S 296-302.

It is not claimed that the Riverside Division, SPECIAL CHARTER, is exempt. They admit that they purchased it, and that it is not and never was exempt. It runs as above stated, from Leland to Huntington on the Mississippi River, and then commences at Wilczinski on this Leland line and runs down to Hampton, with a branch out to Glen Allen, also on the Mississippi River.

Record, pp 297, 299-300, 394, 396

The part which they claim to be exempt, and call simply the Riverside Division, are the two branches, one running to Coahoma Station on the north, and the other to Rolling Fork on the south, connecting this Riverside Division, Special Charter, with the main line, both ways, and thus forming a continuous loop, so that trains coming down the main line, could and did run either way from Coahoma Station to Rolling Fork and vice versa. We say there was not even color of authority to build this loop in any of the charters except that of the Memphis & New Orleans Railroad & Levee Company, and that was not only not exempt, but an exemption was provided against in the above two acts.

Record p 407-408.

These two ends were built in 1889 with some other parts not exempt.

Record p 359.

Yazoo M R R Co. v Adams, 76 Miss. 550-554
Chicago R R Co v Guffey 120 U.S. 569.

Now as to the Tallahatchie Branch.

That was built by the Louisville, New Orleans & Texas Railway Company, and under that portion of the constituent charter of the Memphis & Vicksburg Railroad Company, section 18, which authorized it to build branches on the east to the Yazoo, Tallahatchie or Coldwater Rivers.

Record, p 39, 394

But no stock was issued for or on account of it. The entire $5,000,000 of stock had been previously issued on account of the main line, and to purchase the Riverside Division, Special Charter. Record, pp 395, 396, 398

The cost of the Tallahatchie Branch, according to the itemized exhibit filed by Major Edwards was $497,076.74, about $12,500 per mile for the 39.59 miles.

Record, p 487

It was built in 1889–1890, and there has been no year since when the net profits were not much more than sufficient to pay the entire cost of construction in one payment.

Record, pp 402-403, 487, 375

These are the facts as shown by the record, and it would not have been error to reject the pleas, even on their statement of the merits, for they do not claim that the main line was built by the Louisville, New Orleans & Texas Railway Company, further than to say that it was organized in 1884, and built the main road, COMMENCING IN 1882, AND FINISHING IN 1884, adding branches till 1891.

Record, pp 520, 560, 587

The Court should act on the presumption that the party has stated his case as favorably as he could,

Stephen v Beall, 22 Wall 329.

And there is no rule of law which requires a court, without any excuse, or affidavit accounting for the delay, or even to the truth of the plea, to receive a plea, which is not only manifestly insufficient on its face, but which the record before the Court shows could not possibly be amended, so as to present a

ev·e more favorable to the defendants, and on the defendants' o vn evidence, taken under oath.

The part of the railroad south from Vicksburg to Port Gibs on, a distance of 28 miles, and other parts had been built by the Baton Rouge Company and were being actually used for traffic in 1882 and 1883, and under the terms of the statute itself that "if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished," was liable to taxation and yet it is claimed that the consolidation withdrew this part, and other parts in the same condition from the tax rolls.

Record, pp 415, 416, 461
Code 1880, sec 597, 608

C.

Consolidation made, not authorized.

The Memphis & Vicksburg Railroad Company was chartered in in 1870, and authorized to build a railroad from Vicksburg to Memphis, and the Mississippi Valley & Ship Island Railroad Company was chartered in 1871, and authorized to build a railroad from some point on the Gulf of Mexico, at or near Ship Island to the city of Vicksburg.

Laws of 18[illegible] p 562 sections 1 and 2.

The Supreme Court of Mississippi, like this Court, has decided that it is proper to take judicial notice of the contents of a railroad charter.

Georgia Pacific Ry Co v Baird No 9147, decided December 5th, 1898, 76 Miss. 523-524

Unity v Burrage 103 U S 447.

Now it was clearly the object of the act of March 3rd, 1882, authorizing the consolidation of these two companies alone and by name, to provide for the building of a railroad from Memphis via Vicksburg to Ship Island, and thus establish a great seaport in Mississippi.

The Baton Rouge Company was not thought of, for it had not been chartered, and was not chartered till March 9th, 1882.

Record p 31.

When the Mississippi Valley & Ship Island Railroad Company failed to go into the consolidation, the act of March 15th, 1884, was passed, allowing the Memphis & Vicksburg Railroad Company to consolidate with any other railroad company "with the rights, privileges and immunities" mentioned in the said act of March 3rd, 1882, which was to build a railroad from Memphis via Vicksburg to Ship Island. Hence we contend that it never was intended by this special act to authorize any consolidation between the Memphis & Vicksburg and Baton Rouge Railroad Companies, and there was no need or necessity for it, because each of said companies was authorized to consolidate by sections 16 and 25 of their respective charters, and the consolidation actually made should be referred to that authority.

Record p 30, section 25 and p 39 section 16.

This is referred to by the Supreme Court in their opinion of November 22nd, 1898.

Record p 674-675.

The only difference was that a consolidation under these two sections of their own charters would not carry any exemption into the consolidation, and this they well knew, and deliberately attempted to steal an exemption, and yet they are now placed in the extraordinary and plainly inconsistent position of claiming that these two sections, which were absolutely their only excuse or authority for consolidating with the Yazoo & Mississippi Valley Railroad Company (the act of March 3rd, 1882, containing within itself no specific authority to consolidate at all) did carry the alleged exemption into that consolidation.

It will be noticed that the 5th section of the charter of the Yazoo & Mississippi Valley Railroad Company expressly provided that it should not have the effect of exempting the consolidating company.

Record p 48-49 section 5.

Now this Court has by a course of decisions settled the rule that there must appear a legislative intention for the exemption to pass into a consolidation, and that it will not pass by presumption.

Phœnix Ins Co v Tenn 161 U S 178-183.

The Baton Rouge Company never did have any exemption and consequently there could have been no legislative intention for any to pass, and the Memphis & Vicksburg Railroad Company is virtually in the same fix, because at the time the charter was granted and it was authorized to consolidate, it had no exemption and hence there could have been no legislative intention for any to pass. Its exemption was conferred by a subsequent amendment which had nothing to do with consolidations.

And we believe it would have been an impossibility to have got the Mississippi legislature, ar any other legislature to have knowingly given an exemption to a railroad already virtually built.

Wilmington v Alsbrook 146 U S 279.
Phœnix Ins Co v Tenn 161 U S 178-183.

D.

Inflation of debt.

It is shown by their own evidence that the entire cost of the road up to December 31st, 1884, after it had been completed and put in full operation was $10,916,783.94.

Record p 476.

This included all the property in Louisiana and Tennessee, besides such items as "R. T. Wilson & Co., commissions for financiering construction, $436,000; cost of venture, franchises, &c., &c., $515,344.67," &c., &c.

Record p 479-480.

Now R. T. Wilson & Co. and C. P. Huntington & Co. owned both the railroads and the Financial Improvement Company which built them. They simply contracted with themselves, and as this Court remark in another case, under such circumstances their contracts were just simply what they might choose to make them, and yet here is a charge of nearly a million dollars for making with themselves just such contracts as they chose. They advanced all money that was advanced.

Record p 298, 301, 414, 422.
Galveston v Cowdry 11 Wall 459.

In order to secure themselves they had the Louisville, New Orleans & Texas Railway Company on September 18, 1884, to execute a mortgage, under which up to August 25, 1886, they had issued $13,641,000 of 5 per cent. first mortgage bonds. This was all a currency transaction, and the increase was in bonds at 75 cents on the dollar.

Record p 185, 396-397.

And yet on August 25, 1886, without the knowledge or consent of the State of Mississippi and in defiance of its rights, they changed this into a gold transaction, took a new mortgage, and changed the $13,641,000 of 5 per cent. currency bonds, into $10,000,000 of first mortgage 4 per cent., $7,899,000 of second mortgage 5 per cent. gold bonds, with a difference in interest or fixed charges AGAINST THE STATE of $112,900 in gold per annum, and a difference AGAINST THE STATE in the principal sum of $4,258,000, enough to build the entire road, which was of course to their advantage, but released the State from any obligation to continue an appropriation to this new and enlarged debt made without its knowledge or consent. The relation of the State was somewhat in the nature of a suretyship or pledge of credit, and this radical change in its nature and amount was clearly a release of the State. This Court can well imagine that if the State had required them to change this back into the original $13,641,000 currency transaction they would willingly have released all claim to exemption in preference. They were simply continually stocking and especially bonding this noble little road up to the full limit of its increasing capacity, and thus millionaires are quickly made, but we have no fault to find with all this, if they would first pay a little taxes for this valuable franchise and protection.

E.

Cost of road and statement of net earnings.

As we have shown before, the railroad was built under contracts made with the Construction Company by the railroad companies, all composed of the same persons. Where the ex-

emption from taxation is conditioned on the inability of the railroad company to pay a dividend over the cost of construction this Court has announced the just and fair rule, that they must both deal fairly with each other, and that only the reasonable and legitimate cost of construction is to be considered, and this is necessarily so where the contractors and contractees are the same persons.

Mobile & Ohio R R Co v Tennessee 153 US 506-507.

And betterments and improvements are not allowed, for the obvious reason, that the State has no stock, nor voice in the management, and the railroad company could just sit down figuratively, and calculate the amount of taxes, and put that amount in betterments and improvements, and thus like a purchaser or tenant, improve the State out of its estate in the taxes altogether, besides being an unconstitutional delegation of power to an individual to make laws, to the extent of saying when he would be taxed and when he would not, turning over the whole business to him.

To the same effect is the opinion of Judge Jackson while on the circuit in

Mackintosh v Flint 34 Fed R 582, 592-616.
Barry v Mo Kans & Tex R R Co 27 Fed R 8-9.
M & O R R Co v Tenn 153 U S 506-507.

Now to get at the actual cost. The parts in the controversy are:

The Riverside Division 85.85 miles.
The Tallahatchie Branch 39.59 miles.
Entire main line 456.15 miles.
The main line in Mississippi 314.92 miles.
Record p 76, 620, 375, &c.

This including the part below Vicksburg, makes in round numbers in Mississippi about 315 miles for the main line, and about 125 miles for the Riverside and Tallahatchie Branches, or about 440 miles in all.

O. A. Gibson, an old railroad contractor, who helped build a large part of this railroad estimates the actual cost at about $10,000 per mile.

Record p 433-435, 440-441.

Maj. R. H. Elliott, the engineer and superintendent of construction of the greater part of it, and through whose hands the pay vouchers passed, estimates that on account of some washouts, etc., the actual cost was about $13,000 for the main line and $10,000 for the branches, but these washouts were paid out of OPERATING expenses.

Record p 458, 459-461.

Maj. Edwards puts the cost of the entire main line, including all these commissions, etc., on December 31, 1884, as shown in supra, at $10,916,783.94. That is about $23,940 per mile for the entire 456 miles. In his exhibit he puts the actual cost of the Hampton and Bolivar branches, which was the Riverside Division at $1,063,386.27 and the cost of the Tallahatchie branch at $497,076.74.

Record p 482, 487.

This would make the cost as follows:

According to Gibson, 440 miles,	$4,400,000.00
According to Elliott	
Main line 315 miles @ $13,000	4,095,000.00
Branches 125 miles @ $10,000	1,250,000.00
Total	$5,345,000.00
According to Edwards	
Main line 315 miles @ $23,940	7,541,100.00
Riverside Division	1,063,386.27
Tallahatchie Branch	497,076.74
Total	$9,101,563.01

Edwards makes a terrible to-do about the great cost of the washouts, but this was done out of operating expenses, and the great cost of miles of trestling, but the chief engineer of construction of all the the trestling part of the road shows that he gave all the vouchers for this, and it cost $422,500, about $20,000 of which was at the time done by the railroad company out of operating expenses, and of course the balance relieved that much of the grading, as it occupied the long spaces instead of grading, an also about the heavy expense of levee work, but

Maj. Starling, the chief engineer of the levee board, shows that the levee board paid them for every dollar's worth of work they did on the levees, even for their own protection, except about $500 worth which they agreed to do free, and then afterwards tried to slip in a bill even for that.

Record p 428, 458-462.

They charged for everything, but forgot to give any credits, and managed to charge about double the estimates of those who did the work, and made out the pay vouchers. It must be remembered that all these washouts, repairs &c, came out of the operating expenses, and the net earnings were what was left after all these things were deducted.

Maj. J. C. Welling, the vice-president of the whole system, explains under cross-examination what the operating expenses consist of. He says they consist of perhaps a hundred items among which are all necessary repairs to rolling stock, and keeping the road in good condition, renewing bridges and cross-ties, repairs and renewals of all descriptions, transportation, maintenance, structures, equipment, taxes and general expenses.

Record p 166-167.

And in answer to direct questions he admitted that they also included WASHOUTS, CREVASSES &c.

Record p 178.

And was forced to admit that the reason the net profits were smaller in 1892 than in other years about that time was that they spent $638,894.76 ON BETTERMENTS AND IMPROVEMENTS.

Record p 173 and 177-178.

Now the amount of interest or fixed charges on the 4 per cent gold bonds representing cost of construction would be (the branches being built in 1890.):

Gibson's $4,400.00	@ 4 per cent	$176,000.00
Elliott's $5,345,000	@4 per cent	213,800,00
Edwards previous to 1890 $7,541,100		301,644.00
Edwards after 1890 $9,101,263.01		364,062.52

Now the net earnings back to 1886 as far as we are authorized to go, is, as shown by their own exhibit prepared especially for this occasion;

For 1886	$495,180.09
For 1887	635,321.00
For 1888	579,660.30
For 1889	969,509.26
For 1890	742,253.49
For 1891	992,394.63

For 1892 to May 1st	$137,234.66	$1,367,792.91
For 1892 after May 1st	591,663.49	
For betterments	638,894.76	
For 1893		$1,100,887.75
For 1894		922,879.59
For 1895		1,078,677.22

Record p 181, 402, 478.

But as shown by their annual reports to the company itself, only four of which we succeeded in getting, the net earnings were as follows:

For the year 1887	$ 722,083.24
For the year 1888	652,441.59
For the year 1889	1,217,662.24
For the year 1890	1,071,426.96

Record p 331, 344-345, 360, 376

For 1889 it will be seen the net profits are made up of two items, $1,040,657.51 and $177,004.73.

Record p 360.

Here there was no motive to conceal the true earnings, and it seems to be certain that the net earnings have been much more than sufficient to pay the fixed charges on the construction debt and there was no authority to divert it to other purposes, or other debts, before the payment of taxes. The fixed charges on the proper construction debt, and that only, was entitled to priority over the taxes. Any other course would have been folly, as they could have increased outside debts at pleasure, even to buying aluminum steel rails, and gold lined cars. No dividends should be allowable against the State for the reason that it was fictitious stock as we will endeavor hereafter to show, but taking the whole combined $5,000,000 of stock, and the net earnings have been more than sufficient to pay the in-

terest on the proper construction debt, and an 8 per cent. dividend on the entire stock ever since the year 1887, and whenever this first occurred the appropriation was to cease by the terms of the 21st section itself.

The part above Vicksburg to Memphis is 219 miles long, and from Memphis to the Mississippi line is about 5 miles, leaving about 214 miles in Mississippi above Vicksburg.

Record p 461.

This deducted from the entire 315 miles in Mississippi leaves 101 miles below Vicksburg built by the Baton Rouge Company, and the Riverside Division 85.85 miles, makes about 186.85 miles, about which we do not think there ought to be any plausibility of a claim to an exemption, and only leaves 253.15 of the 440 miles in Mississippi, but in the above calculation we have given them the benefit of the entire 440 miles and their own figures as to its cost. It must be remembered that the Riverside debt of $1,063,386.27 was not incurred till 1889, and the Tallahatchie debt of $497,076.74 in 1890.

But it has been settled that they are only entitled to appropriate the taxes to those parts of the railroad in Mississippi entitled to it under their charters.

M & O R R Co v Moseley 52 Miss 130.
M & O R R Co v Tenn 153 U S 505-506.
R R Co v Lambert 70 Miss 786.

Indeed it could only apply to the construction debt of Memphis & Vicksburg Railroad Company and its pro rata of the stock, because when the 21st section was extended to it, it never had consolidated with anything, and hence these things necessarily applied to it alone, and roads built by the Louisville, New Orleans & Texas Railway Company, under the 5th section of its charter.

Now let us make a calculation on this, the only proper basis. The main line was 456 miles long in round numbers, of which 315 were in Mississippi. Deduct the Baton Rouge part below Vicksburg of 101 miles, and it leaves the main line 214 miles. Now add the Tallahatchie Branch, about 39½ miles, and we have a total of 253½ miles, and the proper pro rata share of the stock, 214–456 of $4,547,000 would be $2,133,882, and an 8 per cent. dividend would be $170,610.56.

Then Gibson's estimate of cost

253½ miles @	$10,000	$2,535,000.00

Elliott's estimate

214 miles main line @	13,000	2,782,000.00
Tallahatchie Branch @	10,000	395.000.00
Total		$3,177,000.00

Edwards' estimate

214–456 of $10,916,783.94	$5,123,666.15
Tallahatchie Branch	497,076.74
Total	$5,620,742.89

Fixed charges and dividends,

Gibson $2,535,000 @ 4 per cent	101,400.00
8 per cent dividend on stock	170,610.56
Total $	272,010.56
Elliott $3,177,000 @ 4 per cent	127,080.00
Dividend on stock	170,610.56
Total $	297,690.56
Edwards 5,620,742.89 @ 4 per cent	224,829.71
Dividend on stock	170,610.56
Total $	395,440.27

Net earnings from evidence and annual reports, to cover the years in suit.

For 1889	$1,217,692.24
For 1890	1,071,426.96
For 1891	992,394.63
For 1892	1,367,792.91
For 1893	1,100,887.75
For 1894	922,879.59
For 1895	1,078,677.22

Net earnings for 1896 and 1897 not accessible by reason of withdrawal of pleas.

Gibson shows that most of this line was in the Mississippi Delta where it is almost level, and that it was one of the cheapest roads ever built.

Record p 433-438.

We have taken Edwards' exhibit 1, as it stands, but we submit that the following should be expunged from account including 1884, 1st column:

General expenses	$ 107,576.01
Legal expenses	57,102.57
Lumber and timber	58,929.82
Telegraph construction	53,568.90
Street railway in Vicksburg	7,697.47
Terminals in New Orleans	304,883.11
Levees	103,697.85
Rent of I C R R track	8,625.85
Ballast	228,639.01
New Orleans yard	33,418.59
Memphis yard	4,576.48
Insurance	5,399.15
Land account	62,376.81
Stock in Grand Gulf &c R R	17,003.20
Interest	929,957.93
Incidentals	3,142.03
Miscellaneous	7,677.98
R. T. Wilson's commissions	436,000.00
Cost of venture, franchises &c	515,344.67
Total	$ 2,935,567.71

Record p 479-480.

F.

That the stock was fictitious.

There was originally issued $4,547,000 of stock on the main line, and they afterwards paid $453,000 of stock as part of the purchase price of the Riverside Division, Special Charter, which was not, and was not even claimed to be, exempt under the laws of 1884,

p 935. It would indeed be a strange ruling to hold that a railroad bought for cash was not exempt, but that if it was bought on credit for part bonds and part stock, while it was not exempt, yet the bonds and stock would exempt another railroad by being allowed interest on the bonds and an 8 per cent. dividend on the stock, before the other road could be taxed, which would ~~be~~ exceed ~~such~~ exempting the purchased road itself.

Record p 395, 396, 398.

Chicago v Guffey 120 U S 569,

Now under the previous head, if we deduct this $453,000 and leave $4,547,000 instead of $5,000,000 as the proper capital stock used in the construction of the main line and entitled to a dividend, we shall see still more plainly that the net earnings have been more than sufficient to pay the fixed charges even as made out by them, and the 8 per cent. dividend besides. But this $4,547,000 of stock was a pure gratuity. The Supreme Court expressly call it fictitious stock, record p 675-676, and as shown above, the first mortgage 4 per cent. bonds of $10,000,000 more than covered every single dollar actually expended in construction, even according to their own figures, if we leave out the gratuitous commissions, etc., paid by the parties to themselves. It is idle to talk and argue before this Court about the great uncertainty of the enterprise, and what they would have been compelled to do, to get others to take the bonds or to undertake the job. The fact remains that they did not get others to take bonds or undertake the job, and they undertook it themselves, under an express contract with the legislature so far as they could make it, that the State should allow them the interest on the construction debt, and an 8 per cent. dividend, and they were not entitled in addition to this gratuity, to enormously inflate the bonds, and take the stock for nothing. Such a proposition is monstrous. This Court has well explained it in a similar case from Tennessee, where there was no constitutional objection. In that case the charter provided that "no tax shall ever be laid on said road or its fixtures which should reduce the dividends below 8 per cent."

Mobile & Ohio R R Co v Tennessee 153 U S 500.

In regard to this it is said "the manifest object of the clause was to invite and encourage the investment of private capital in

the enterprise of building the road," ib p 501, and on p 502 that "to induce its own citizens as well as outside capitalists, to invest and risk their money in the enterprise, MORE OR LESS HAZARDOUS, was the manifest object of the exemption," etc.

And on page 506 the Court say in ringing and no uncertain tones, "in dealing with an exemption from taxation, like that under consideration, good faith is required on the part of BOTH PARTIES to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation," and the opinion gets stronger and stronger from there to the end.

153 U S 506-507.

The appropriation of the taxes was the consideration for the extra hazard, and it never was the intention that these parties dealing with themselves, should have the power to increase the stock and debt "at will and without limitation."

As the amount of bonds largely exceeds the cost of construction, the stock is purely fictitious, and as the assessment rolls show, never has had any market value, or any other value except to control the road, and keep these parties and their assignors in office.

Record p 620.

The law is, that a railroad corporation, unless expressly authorized by its charter, cannot dispose of its stock at a discount or at less than its par value in money, property or labor, and it cannot give away its stock as a bonus with its bonds, as was clearly the case here.

2nd Thompson Comm on Law of Corp, § 1562-1564, 1586

1st Morawetz Priv Corp section 289.

Upton v Trabilcock 91 U S 45.

The Baton Rouge Company could settle its stock at a discount, but was never exempt.

Record p 29-30, section 20 and 21,

But neither the Memphis & Vicksburg Railroad Company, nor the Louisville, New Orleans & Texas Railway Company was authorized to dispose of stock at less than par.

Record p 32-34, section 3-6 and p 42, section 7.

Hence giving the stock with the bonds in this case, as a part

of the construction contract when the amount of the bonds far exceeded the cost of construction, was a pure gratuity, and not available against the State in the collection of its taxes. Human nature prevails everywhere. The Construction Company both owned and built the road, and it must be evident to this Court that it was to their interest to make the road cost AS MUCH instead of AS LITTLE as possible, and this without regard to the question of taxation, and doubly so with it.

And in this connection, it is well to remark that the Yazoo & Mississippi Valley Railroad Company under the 3rd section of its charter (Record p 47) was authorized to "issue said stock or any part thereof as fully paid up and not liable to calls," and it would be attributing great folly to the legislature, to hold that it intended for an exemption conditioned on the inability to pay an 8 per cent. dividend on the stock, to pass into a consolidated company authorized to issue paid up and non-assessable stock. The 5th section of the charter provides (record page 49) that on any consolidation, the consolidated company should have, among other things, all the rights and powers herein granted," and by articles 3 and 4 of the deed of consolidation of Oct. 24th 1892, the consolidated company was authorized to issue stock to the amount of $15,000,000, and in that event the old stocks were to be exchangeable for the new at par. "Fully paid up and not liable to calls," here does not mean non-assessable in the ordinary use of that term, because the Constitution of 1869 provides that a stockholder shall not be liable beyond the amount of his subscription.

Record, pp 15, 47-49

Code 1880, p 37, art 12, sec 17

Hence the term here means GRATUITOUS stock, and it is not conceivable that the legislature intended an exemption like the one claimed here to pass into a consolidated company with such powers.

G.

The Yazoo & Mississippi Valley Railroad Company, when giving in this property for taxation UNDER OATH, value it at

$5,500 per mile, and the value including rolling stock, at $2,713,904.

Record, p 619-621

And the court in fixing a value, is justified in taking their statement when giving it in for taxation, instead of their statement when trying to escape taxation, and they have nothing to complain of.

People v Barker, 39 N Y Suppl 682-683

The State Railroad Assessors fixed it themselves at $12,000 a mile, which was a little less than Major Elliott's estimate, and a little more than Gibson's.

And as the earning capacity was constantly increasing enormously, it would seem that it ought to have been worth at least as much when they gave it in, as when first built.

H.

Novation.

Under its mortgage of September 1, 1892, the Illinois Central Railroad Company issued $25,000,000 of its own 4 per cent gold bonds, with which to purchase the stock and bonds of the Louisville, New Orleans & Texas Railway Company, pay any other debts of said company, and to pay for protecting, repairing, completing, improving or extending the railroad and branches, and providing elevators and docks, and works, structures, rolling stock and other equipment.

Paragraph Fourth, record, p 135-136

With power to have cancelled the prior mortgages.

Record, p 138

After the consolidation of October 24, 1892, the Yazoo & Mississippi Valley Railroad Company, on April 14, 1893, executed a new mortgage to secure the Illinois Central Railroad Company for and on account of its said mortgage of September 1, 1892, and to secure advances out of said $25,000,000, it being stipulated that the original bonds of the Louisville, New Orleans & Texas Railway Company might be cancelled.

Record, pp 265, 267-268

When we endeavored to show what the transactions themselves mean, that the bonds of the Louisville, New Orleans & Texas Railway Company have been entirely withdrawn from the market, and are only placed with the Trust Company as collateral security for the Illinois Central Company bonds which have been substituted, the defendants strenuously objected, because we tried to use the Wall Street Report of Latham, Alexander & Co., which shows it.

Record, p 418-419

But the trust deeds show that the whole thing, money for purchase of STOCK, CONSTRUCTION DEBTS, debts for betterments and improvements, and for purchase of other railroads, and docks and elevators, and advances for future use for all purposes, is all consolidated in this $25,000,000 mortgage of the Illinois Central Railroad Company, and no one can separate it or the stocks or the bonds, and tell who owns the construction debt, and how can any affidavit be made, or taxes paid on any construction debt. Of course the interest is not paid on both sets of bonds. It is paid and applied in solido on these Illinois Central bonds, and the earnings are sufficient to pay the interest on the whole $25,000,000.

Newman v Kling 73 Miss. 312.
Railroad Co v Maine 96 U S 499.

A railroad which entire, with all its branches, costing not exceeding nine or ten millions of dollars, in eight or ten years has such enormous profits, that sells for $25,000,000 in gold, and easily earns a net annual income of more than a million of dollars, is so poor that it cannot pay taxes. Such wonderful poverty! Our pity is so great that our pride is gone and we lose sight of great eight and ten story buildings, and are willing to come round and condole with them, if it is only on the ground floor. We never before understood what the wise (rich) man meant, when he exclaimed so fervently "give me neither poverty nor riches!" He must with prophetic vision just have yearned for a simple, unadorned place "ON THE GROUND FLOOR."

I.

The questions decided by the Court in the summary of June 20th, 1898, are right on the merits as shown by the full opinion of November 22nd, 1898. This Court after a long and apparently conflicting series of decisions, finally brought order out of chaos, and the State Court shows an unusual respect for this Court, for that opinion is founded almost exclusively on the later and now settled opinions of this Court, and shows a disposition in all cases of doubt and embarrassment to make the opinions of this Court paramount to all others, which we think ought to be done, to bring about a general American harmony of law and decisions.

IV.

An answer to other statements and arguments of counsel.

The counsel for plaintiffs in error have prepared an exceedingly strong and adroit brief, if we accept their statement of facts, but the fatal defect about it is, that it is built on false foundations, a house built on the sand, or else a splendid creation of the imagination, a brilliant nebula of oratorical scintillations and rhetorical fireworks, but all high in the air.

We claim that many of their statements are immaterial, and others inaccurate, but all stated so adroitly as to have a tendency to mislead this Court, and hence it is necessary to correct them.

We refer to their brief in opposition to our motion to dismiss or affirm, and the pages we refer to are the pages of that brief. Of course we have not seen their general brief, for we never had an opportunity to read the other, before the case was submitted on the motion, but we do not think they can possibly get up any new points.

In this brief we will frequently be compelled to deny their statements and appeal to the record, for that is all we can do. It would be unjust to this Court for us to copy the whole record in

order to show WHAT WAS NOT IN IT. On the contrary the plaintiffs in error hold the affirmative, and we insist that if they assume that anything IS IN THE RECORD, they be required to point it out.

We assume that they will make and elaborate the same points made in their brief in opposition to our motion to dismiss or affirm, and in answering those points here WE WILL REFER TO THE PAGES OF THAT BRIEF.

Those points are as follows:

1st. The policy of the State in granting liberal exemptions, the acquiescence of all departments of the government for twenty-eight years, and the enormous investment of foreign capital.

P 6 7, 8-9, 11-12.

2nd. That the State could undoubtedly make donations, and this was in effect a donation.

P 14-16.

3rd. That the State itself recognized the distinction between the exemption and appropriation forms.

P 11, 12-16, 44 and appendix xiv-xvii.

4th. That we misrepresent their position.

P 43.

5th. The Federal questions have been raised all the time.

P 2, 3, 24, 33, 36-37.

6th. This case falls under the second class of section 709 of the Revised Statutes.

P 30-32.

7th. Federal question raised by the Supreme Court referring to page 118 et seq., in brief of opposite counsel on first appeal.

P 12.

8th. That a suggestion of errors is a matter of right, and Federal question raised in it.

P 34-35.

9th. About it being the local practice in Mississippi to withdraw pleas, and appeal on bills of exception.

P 40.

10th. That the Yazoo & Mississippi Valley Railroad Com-

pany vs Thomas 132 U S 174 is authority for the writ of error here.

P 28-29.

11th. That the effect of the reversal on the first appeal was to open up the case anew.

P 36.

12th. That the Federal questions were necessarily involved in a new trial on the merits.

P 38.

13th. That the Federal questions were raised in time in the suits for taxes of 1896 and 1897.

P. 37-38.

14th. The statement that the Supreme Court had the suggestion of errors before it for five months and undoubtedly considered it in preparing the opinion of November 22, 1898.

P. 35.

15th. The certificate of the Chief Justice.

P. 3-4, 36-37.

16th. About foreign capital.

P. 7, 8.

17th. That the Federal questions were raised by the declarations.

P. 32-33.

IV 1.

The liberal policy of the legislature in granting exemptions, etc. P. 6-9, 11-12.

The counsel for plaintiffs in error prove on page 6 of said brief, by the case of Mobile & Ohio Railroad v Tennessee, 153 U S 486, 502, that in construing statutes, it is proper to take into consideration the history and situation of the country at the time, "rather than at a later period when different ideas and theories may prevail."

This is all very good but they have not carried it far enough. It also applies to constitutions.

And by recalling the fact that for the first time in the his-

Read 3rd line 22nd brick

article 7 of the Constitution of 1869, and extended to hundreds of thousands of freshly emancipated slaves, utterly uneducated tory of the State, universal suffrage was adopted by section 2 of and utterly unused to the wiles of the demagogue, and totally ignorant of governmental affairs, and constituting a great majority of the population, it will readily be seen that sections 5, 13 and 14 of article 12 of that Constitution had a potent meaning, and a direct purpose to prevent this great liberality of the legislature. We do not consider that involved here, for reasons hereafter to be stated under the next head, and hence we merely refer to it.

Further, there was no such general acquiescence, as is claimed by counsel for plaintiffs in error, in this kind of legislation. We suppose the statement is made to work on the sympathies of this Court, in connection with the direct charge of "grossly breaking the plighted public faith and indefensibly violating solemn obligations" against the Supreme Court of Mississippi, on page 11-12 of that brief.

The railroads were all taxed under the revenue laws of 1875 and 1878.

Laws of 1875, p 66, 70 Miss 786-787

Laws of 1878, p 87

And the Mobile & Northwestern Railroad Company having only succeeded in building a few miles, and being in an impoverished condition, had to get an express release from the legislature as to BACK TAXES, but the act DID NOT APPLY TO FUTURE TAXES.

Laws of 1880, p 271

And this railroad is a part of the Louisville, New Orleans & Texas Railroad, known as the Helena Branch, and the father of this 21st section.

Record, p 297, 394

And in the charter of the Jackson, Yazoo City & Arkansas Railroad Company is an express legislative declaration that this 21st section is repealable, and C. P. Huntington, SOTTO VOCE, was the chief promoter, and one of the incorporators of that railroad company.

Laws of 1880 p 228 section 1 and p 234 section 13.

And the Mobile & Northwestern Railroad and C. P. Huntington were great factors in the Louisville, New Orleans & Texas Railway Company, the first being a branch, and the other, C. P. Huntington and associates, owning 60 per cent of its stock and 60 per cent. of the stock of the Financial Improvement Company that built it.

Record p 298, 301, 422.

And in previous litigations, this Louisville, New Orleans & Texas Railway Company has dodged and evaded the true issue, and carried their litigation before the State Supreme Court on false and fraudulent records, claiming that the exempt Mississippi Valley & Ship Island Railroad Company was one of the chief constituents forming the Louisville, New Orleans & Texas Railway Company, instead of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, which was authorized to build all the way from New Orleans to Memphis, BUT HAD NO EXEMPTION.

McCulloch v Stone 64 Miss 393.

L N O & T Ry Co v Taylor 68 Miss 364.

And this last was decided solely on that belief.

And having set these little "traps for the unwary" they actually seek both on their pleadings and briefs to use them as stare decisis and other things in this suit.

If this Court think these lawyers, or these railroads either, are in danger of being made the innocent victims of breaches of the public plighted faith or traps for the unwary, we pray you beware.

You can't lose Mr. Huntington. If you get ahead of him, you can't get up early enough that night, but must get up the night before, or even earlier than that, and even then have a hundred eyes, and only sleep with one at a time. When he saw this little tax storm brewing he sold out to the Illinois Central Railroad Company, and with an innocent chuckle, had it put in the 3rd paragraph of [redacted] trust deed "that it would cause to be paid off and discharged in due season all taxes and assessments which may from time to time be lawfully levied or imposed by competent authority" upon said property.

Record p 135.

The formidable array of railroad companies with the exemption and appropriation forms in their "Appendix C" p xiv-xvii is no doubt intended primarily to show the difference between the two forms, and the great liberality of the legislatures, but probably intended also secondarily, to make a grand parade of the vast breach of faith being committed.

Now, the defendant in error in this case, the State Revenue Agent, is the proper officer, whose duty it is to look after these delinquent taxes, and he does not wish to show any partiality, or make any discrimination, and hence authorizes us to state that of all this vast array of railroads, all that have been built, and including all mentioned in section 608 of the code of 1880, and in the tax laws of 1884, page 30-31, and laws of 1890, page 12-13, including the New Orleans & Northeastern, now a part of the Queen & Crescent system, and the Greenville, Columbus & Birmingham Railroad, afterwards a part of the Georgia Pacific, Laws of 1882, page 824, and now part of the Southern System, all, all, are and have been for many years regularly paying their taxes, State, county, and municipal, except this system and a little, short, poverty stricken road in the southern part of the State, called the Gulf & Ship Island, and which is also now before this Court on a writ of error. If there are any others now claiming the benefit of any exemption, or not regularly paying their taxes, he waives all technicalities, and willingly agrees for opposite counsel to point them out, for in his official capacity he would like to know.

IV 2.

That this 21st section was not an exemption, but an irrepealable appropriation of taxes, a donation, which the State had an undoubted right to make.

Their brief p 14-16.

We have partly argued this under the previous head.

Counsel for plaintiffs in error cite chapter 359, of the laws of 1871, p 745, where the legislature did actually appropriate

$4,000 per mile to railroads. It was indeed a tempting bait, and should have been greedily swallowed by railroad SHARKS. But unfortunately counsel fail to point this Court to a single instance where it was swallowed.

This Vicksburg, Pensacola & Ship Island or Mississippi Valley & Ship Island Railroad Company did swallow it a little ways, but with a grim smile at its hollowness and Dead Sea taste they permitted the legislature to withdraw the princely donation expressly on the ground of its doubtful constitutionality, and conflict with section 5 of article 12 of said Constitution of 1869, as indeed it plainly was and as would be this 21st section viewed in the light of an agreement to donate taxes.

Laws of 1877, p 170.
Laws of 1878, p 230.

And as is usual in such cases, the State was BUNCOED in the transaction by giving up something for nothing.

This section 5 of article 12 of the Constitution of 1869 is as follows:

"Section 5. The credit of the State shall not be pledged or loaned in aid of any person, association or corporation, nor shall the State hereafter become a stockholder in any corporation or association."

See Code 1880, p 35-36

And when all sorts of schemes were being attempted to be put through the legislature, Major Huggins, one of the leaders of that party, publicly exclaimed on the floor of the State Senate, that these two sections, 5 and 13 of article 12 of the Constitution were the only bulwarks which had stood between Mississippi and bankruptcy.

We have argued this point more at length in our brief on the motion to dismiss or affirm in case No. 320, which involves the taxes on this same property, but must decline to argue it further here, because it is not anywhere referred to in this case in the pleadings. All pleas except the rejected 4th, 5th and 6th pleas are withdrawn, and it is certainly not set up in any of them.

That there were two forms of charters, one the exemption form, and the other this appropriation of taxes form, and that "the State therefore clearly recognized the essential difference between the two forms of contract."

Their brief, pp 11, 12-16, 44-45,

And appendix, p xiv-xvii

In making this argument, it would have been more plausible if the counsel for plaintiffs in error had left out the citation of charters in their appendix.

The Mississippi Mills case, 56 Miss, p 40, et sequitur, decided that this appropriation form, page 42-43, was a simple exemption from taxation, and while not void AB INITIO, under sections 13 and 20 of article 12 of the Constitution of December 1, 1869, yet by force of these sections was repealable and could not be made IRREPEALABLE.

This decision was made at the April Term 1878.

Now if we turn to this appendix, it will readily be seen that the year 1878, with the exception of some few isolated cases, where this 21st section was brought forward into charters by reference merely, as in the 5th section of the charter of the Louisville, New Orleans & Texas Railway Company, was the exact dividing line between these two forms of charters, showing clearly that instead of the legislature recognizing any essential difference between them, that the exact reverse was true, and the later form of a straight exemption was thereafter adopted, because the Mississippi Mills case had settled that THERE WAS NO ESSENTIAL DIFFERENCE.

Before the Mississippi Mills case, they all clung to this straw of an appropriation form, and after the Supreme Court had decided it to be but a repealable exemption, they dropped this palpable attempt at evasion, and took theirs straight, leaving off the sugar, mint and water, and all other frills.

And both these plaintiffs in error, actually adopted and acted on that construction, notwithstanding their counsel are

now engaged in an attempt to start a new revival of State religion.

The charter of the Yazoo & Mississippi Valley Railroad Company was granted in 1882, and it took this straight exemption form, and its promoter and owner, the Illinois Central Railroad Company, at the same time got legislative authority to purchase the stock of the other, and as the record in this case shows, did purchase it.

Laws of 1882, p 847 sec 8, and p 1024, sec 3

Record, p 52: Record, pp 146, 170

So it is entirely clear, that they did not think there was any essential difference between the two forms, at least, none in favor of the appropriation form, for they took the other in preference, probably rightly believing that the "irrepealable" feature in the former would on a test render it unconstitutional, just as it has done.

IV 4.

That we entirely misrepresent the point upon which the plaintiffs in error rely, when we said in our brief on the motion to dismiss or affirm, that it is not claimed by them "that their alleged exemption was ever repealed or attempted to be repealed by the legislature."

Their brief p 43.

All their pleadings are withdrawn except the 4th, 5th and 6th pleas.

The 5th pleas plead the Lambert case in 70 Miss. R 779 as res adjudicata. The 6th pleas plead the former decisions of the courts and acquiescence and action of the State officers as stare decisis, a rule of property and estoppel.

So if there is anything of that kind it must be in the 4th pleas.

Now these 4th pleas expressly state that "at various sessions of the Legislature during said period, members thereof introduced bills for the purpose of repealing said privilege of said section, but each successive legislature at which such efforts were made refused to repeal the same," and this continued

up to and including THE YEAR 1898, the last year in which the legislature has met, "but the legislature again and each time refused to do so."

Record p 561, 566, 589, 593, 575, 576.

We suppose this Court has an extended knowledge of human nature and can appreciate how some things are worked. In the 6th pleas, pages 575-576, are given many instances of where the legislature refused to repeal exemptions, and we can well imagine that in such cases, when the legislature attempts to repeal an exemption granted for say thirty years, the advocates of the railroads appear, and claim that such a course is grossly breaking the plighted public faith, and violating solemn obligations, and if there is anything wrong about it, it can easily be corrected by the courts, and many high-toned men will refuse to violate a contract, even where they think they have the power to do so. The exemption has been given for thirty years, and it looks like a breach of faith to repeal it and hence it is not repealed. When it is attacked in the courts the great and ever present argument is, that it has been decided at least to be repealable, and there is no use of any such summary proceedings, because the legislature has control of the whole matter, and can repeal it at any time, and there is no occasion for the courts to interpose in such plain matters, and thus the see-saw goes on, and the railroad all the time holds on to the illegal exemption.

They do not even charge here that their so-called appropriation is IRREPEALABLE.

Their specific charge is "that this suit by the plaintiff, and the said decision of June 20th, 1898, are violative of section 10, article 1, of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts, and do impair the obligation of contracts as follows:"

And "are violative of section 1, of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law, or to deny to any person the equal protection of the laws; both of which are done by said suit and said decision."

Record p 566-567, 594.

Here is a straight declaration that the alleged exemption

has never been repealed, and that the Constitution of the United States is violated by "this suit and the decision of June 20th 1898."

If there is any statement that this 21st section is not repealable, or that the legislature has ever repealed or attempted to repeal it, the gentlemen have the record before them, and let them point it out to this Court in these 4th pleas.

They have no plausibility for claiming that these 4th pleas raise a Federal question under the 1st head of where "this suit and said decision of June 20th, 1898." violate section 10, article 1, of the Constitution of the United States, in that they violate "the contract between the said Louisville, New Orleans & Texas Railway Company, and its successor this defendant, the Yazoo & Mississippi Valley Railroad Company, and the State of Mississippi, embodied in the said act of 1882, as amended by the act of 1884, aforesaid, and especially in said section five of said act of 1882," which is said 21st section.

Record p 566.

Because as we have shown supra, it is beyond question that this claim is based entirely on the ground that the legislature has never repealed this exemption, but as clearly said in said 4th plea, on the next page, 567, "such requirement not being the will and order of the legislature in the premises, but only by a total and sudden revolution in the judicial construction of the Constitution of the State." It is nowhere claimed or insinuated in the plea that the exemption is IRREPEALABLE but only that it has not been repealed. We call particular attention to the fact that at this time the Supreme Court had not decided that it had been repealed. Let us not get dates and things mixed.

IV 5

That their so-called Federal questions have been raised and insisted on all the time,

P 2, 3, 24, 33, 36-37.

If this is all so, counsel for plaintiffs in error have the whole record before them, and should be able to point it out.

We deny that any Federal question, or any protection of the Federal Constitution, was ever claimed or thought of in any manner in this case, either orally or in writing, either in the pleadings, briefs or arguments, or in any manner whatever, until after the decision of the Supreme Court on June 20th, 1898, and then for THE FIRST TIME in the suggestion of errors filed on June 27th, 1898, and appearing in the record on pages 518-527.

Indeed it crops out all through the pleadings, motions, bills of exceptions, etc., on the second trial in the lower court, that the defendants wanted to get in and plead the Federal questions because of the "NEW ASPECT" put upon the case by the decision of the Supreme Court, and their hope to do this was under Powers v Chesapeake, &c 169 U S 92, 98, which they state on page 42 of their brief they do not rely on.

Record p 540, 544, 567, 608, 610.

It is true they did not expect the Court to decide as it did, and in their opinion it did put a new aspect on the case, and there is no doubt that they thought, and earnestly thought they ought to have some way to get this Court to review that decision, but the only possible excuse they could get up was that the decision of June 20th, 1898, put a "NEW ASPECT" on the case, and they had some sort of right under said case in 169 U. S. to claim that because it did put a new aspect on the case, that therefore they had a right to plead the Federal questions for the first time, but when they attempted to get up their Federal questions, the only thing they could get up was that "this suit by the plaintiff and the said decision of June 20th, 1898," violated the Federal Constitution. The whole theory of their subsequent proceedings at the second trial was that they had no opportunity to set up the Federal questions before that time, and that the opportunity was first created by the new aspect put upon the case by the Supreme Court. The point we make is that this contention is utterly unsound, that any Federal questions they have a right to make now, were directly involved, and could have been made at any time after the beginning of the suit, but as said by Mr. Justice Peckham in Dewey v Des-

Moines, 173 U S p 199 the most that can be said was "that there was somewhere hidden in the record a question which if raised, would be of a Federal nature."

It was involved but was hidden away and they did not raise it plainly because they thought they would not need it, and the point we make is that it is too late to raise it for the first time in the suggestion of errors under repeated and unanimous decisions of this Court, and that is really the only place where it ever was raised either before or since, as the 4th stricken out pleas nowhere even claim that the exemption was irrepealable. Indeed this is so manifest that the plaintiffs in error being (if the Court will permit us to use a slang expression) "between the devil and the deep blue sea," are actually forced to ask this Court to upset itself, by assigning as their 12th assignment of errors here, record p 703, "that the said Supreme Court erred in denying the suggestion of errors filed in this cause in said court, on the 27th day of June, 1898," a thing with which this Court has nothing on earth to do, and which they have decided so often, that it is strange it should still be put in assignments of error. 175 US, 646 = 647.

Citizen's Sav Bank v Owensboro, 173 U S 643-644

IV 6.

That this case falls under the second class of section 709 of the Revised Statutes, and it is not necessary to raise the Federal question.

P. 30-32

To sustain this position opposite counsel refer to

Water Power Co v Street Ry Co, 172 U S 475

In that case the legislature of South Carolina made a contract with the Power Co., and afterwards made another and inconsistent contract with the Street Railway Co., which the Power Co. filed a bill to enjoin, on the ground that it impaired their contract, and the impairment of the contract by the subsequent state statute was the very gist and gravamen of the suit.

In that case, on page 487, the principal case relied on by the

Court, is in the same volume. 172.

McCullough v Virginia, 172 U S 172.

This was one of the long list of Virginia coupon cases. This Court had held the bonds valid, "and the general assembly of Virginia had from time to time passed acts tending to embarrass the coupon holder," and the attempt to enforce any of these acts, of itself and necessarily, raised the question of the impairment of the contract, and was so understood and acted on by the Virginia courts.

Ib p 106, 108, 122, 123.

And the Court add that "it must be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the state, it takes no notice of the subsequent acts, but simply inquires as to the validity of the alleged contract."

Ib p 122.

This was exactly WHAT WAS DONE in this case and, no subsequent act was thought of or urged in the trial or in the opinion and decision of June 20th, 1898.

The Court further, after reviewing the cases on contracts generally, reserve a space for and group the cases relating to "contract exemptions from taxation."

Ib p 119-122.

In these cases referred to, except two, the Federal questions were directly raised and insisted on in the most positive terms.

Yazoo & Miss Valley R R Co v Thomas 132 U S 182.

Mobile & Ohio R R Co v Tenn, 153 U S 491.

In the other two cases, the question was raised in this way: In both cases this Court had decided the property to be exempt, and in both cases the decisions of this Court to that effect were relied on. In the one case it was decided that the exemption had been lost by non-user, and in the other that it was not the identical property, in which of course the Federal question was thus brought directly in issue in both cases, because in each case it became necessary for the Court to decide whether the exemption established by them had been lost by non-user, or was ap-

plicable. In each case the State Court necessarily understood that they were passing on, or rather trying to avoid the effect of a Federal decision, and in both cases, while this Court took jurisdiction, it agreed with the State Courts that in the one case the exemption was lost by non-user, and in the other that it was a branch road, and not the same identical property.

Given v Wright, 117 U S 649.

Wilmington v Alsbrook, 146 U S 284, 293, 302.

Of course this Court will not permit a state court to avoid Federal jurisdiction when a Federal question is necessarily involved, and is the prime or controlling question, by simply not referring to it, and on the other hand they will not take jurisdiction when it is perfectly apparent that the state court had no reason to believe that they were passing on a Federal question.

A later tax case was dismissed for want of jurisdiction because the Federal question was not raised, but the contest was based on a repugnancy between the assessment law and the State Constitution, just like this case.

Hagar v California, 154 U S 639.

While jurisdiction was taken on a peculiar back tax law, where the Federal question was expressly raised in Yazoo & Mississippi Valley Railroad Company vs Thomas 132 U S 181-182, 184, yet in a much later case this Court express a very serious doubt as to whether a general delinquent tax law like the Revenue Agent act in chapter 126 of the Code of 1892, as amended by the act of 1894, Laws of 1894, p 29-31, is a subsequent law within the meaning of the Constitution, that is, as Mr. Justice Brewer puts it, "a law providing generally for subjecting to taxation lands that have improperly escaped taxation in former years," but as the lawyers had made no point on it, and there was another question which did give them jurisdiction, they call attention to it, but do not decide it.

Winona &c v Minnesota, 159 U S [redacted] 5·28–5·29

But the next case involving the very same questions, they dismiss, because the Federal question was not expressly raised.

Winona v Minnesota 159 U S [redacted]. 5·40

In all the late Kentucky back tax assessments the Federal question was directly raised.

173 U S 232, 641, 662-663, 665

174 U S 408-445, 411, 419, 459, 433

And in a case to set aside certain tax assessments, this Court say, "it is not enough that there may be somewhere hidden in the record, a question which if raised would be of a Federal nature." There must be something in the case before the state court, which at least would call its attention to the Federal question as one that was relied on by the party." 176 U.S. 89 = 92 175 U.S. 633 = 635

Dewey v Des Moines, 173 U S 198-200;

See also Citizen's Sav Bk v Owensboro 173 U S 642-644

And under the authority of these cases, and the two Winona v Minnesota cases in 159 U S 528-529 and 540, and the case of Hagar v California [redacted] U S 639, we claim that this class of tax cases comes under the 3rd class of section 709 of the Revised Statutes, where the "immunity" must be specially set up and claimed, and it was never done or thought of in this case till the suggestion of errors.

To the same point see also

L & N R R Co v Louisville 166 U S 714-716

See also cases referred to in May's U S Sup Ct Prac, p 99-100.

IV 7.

That the Federal question was raised by the State Supreme Court referring to page 118, et. seqr., of the brief of opposite counsel claiming that this was an irrepealable appropriation of taxes, and not an ordinary exemption at all.

Record p 12.

But the briefs of counsel are not sufficient to raise a Federal question, and the Court does not refer to any.

Sayward v Denny, 158 U S 180, 183-184.

Zadig v Baldwin, 166 U S 485, 488.

And it was not referred to in the Summary of the Court's holdings on June 20, 1898, at which time the final judgment was rendered, but in the opinion filed several months afterwards, on November 22, 1898, at the next term of the court, after the

Court had lost all jurisdiction of the case, or power to import into it any Federal question.

Record p 676.

And if it had been in the opinion of June 20th, 1898, it would not have raised a Federal question for neither in the brief at page 118 et seq., nor in the opinion of the Court is there any reference to a Federal question, and sections 14 and 16 of article 3 of the Mississippi Constitution of 1890 are the same in that respect as section 10, art 1, and the 14th amendment to the Constitution of the United States.

They are as follows:

"Section 14. No person shall be deprived of life, liberty or property without due process of law."

"Section 16. Ex post facto laws, or laws impairing the obligation of contracts shall not be passed."

See Annotated Code of 1892, bottom page 45, and Code 1880 p 19-20, as to Constitution of 1869

And when the constitutions are similar, and no express appeal is made to the Constitution of the United States, it is the practice of this Court to refer such things to the Constitution of the State.

Miller v Cornwall 168 U S 134-135.

Bolln v Nebraska 176 U.S. 83, 89-92,

IV 8.

That a suggestion of errors is a matter of right, and therefore a Federal question can be raised in it for the first time, p 34-35.

Counsel certainly must be hard pressed. A petition for rehearing is a matter of right under the rules of law, and the rule is made only to limit the time within which it may be made, and yet this Court has persistently and uniformly held that the Federal question cannot be be raised for the first time in it.

Citizen's Savings Bank v Owensboro 173 U S 643-644.

Miller v Cornwall 168 U S 133-135.

Pym v St. Louis 165 U S 273.

Winona v Minnesota (a similar case) 159 U S 540.

Sayward v Denny 158 U S 180.

175 U.S. 646-647.

5704

See our brief on motion to dismiss or affirm, p 12.

The suggestion of errors, is not a matter of either law or right. It is a rule adopted by the court itself for the convenience of counsel and the court, and does not exist in many courts, and can be abrogated by the court at any time. It could have been totally abrogated on June 20, 1898, the very day this case was decided, and how it can be called a matter OF RIGHT is beyond our comprehension.

This rule 10 is in their brief, p 35,

And in our statement, ante, p 3 and 70 Miss p xxii

Every rule is said to have some exceptions, but the only exception to the rule that the original or principal is greater and of more account and dignity, than the substitute is in the matter of drawing pensions.

IV 9.

That it is the local practice in Mississippi when the Court decides against the validity of a plea, to withdraw all the remaining pleas, and appeal on a special bill of exceptions.

Their brief p 40.

We deny the allegation and defy the allegator.

There is no such piece-meal way of trying cases in Mississippi. The general rules of practice in Mississippi, except where the forms of the pleadings themselves have been simplified, are according to the rules of the common law. A litigant there, as in other states, can of course withdraw all remaining pleas, and appeal on a special bill of exceptions, to the refusal of leave to file a new plea, but unless he can induce the Supreme Court in some way, to overrule the action of the court below, and grant him leave to file his new plea, over the head of the trial judge, he is just about in the position of Admiral Cervera's squadron when it emerged from the harbor of Santiago, forced to abandon the courts, and depend on his speed.

IV 10.

That the case of Yazoo & Mississippi Valley Railroad Company vs Thomas, 132 U S 174, is authority for the writ of error in this case.

P 28, 29.

We have already answered that under the IV 6 head, ante., p [redacted]. 93-94

IV 11.

That the effect of the reversal was to open the case anew.

P 36.

The mandate to the lower court is, "You are, therefore, hereby commanded that such execution and further proceedings be had in said cause as according to right, THE JUDGMENT OF OUR SUPREME COURT, and the law of the land ought to be had."

Record p 528-529.

The italics are ours.

It is too plain for argument that this did not authorize the lower court to overrule the Supreme Court, but only to take such further proceedings as would not be inconsistent with their decisions sent down with the mandate.

IV 12.

That the Federal questions were necessarily involved in the new trial on the merits.

Bottom of p 38.

There was no new trial on the merits. Like the illustrious father of his country, Gen. G. Washington, we must confess to the truth. We cannot tell a lie. We did not do it. They cut that valuable new trial tree down themselves, by with drawing their plea.

IV 13.

That the Federal questions were raised in time in the suits for the taxes of 1896 and 1897.

P 38.

We stated in our brief in support of the motion to dismiss or affirm, on page 16, that there was a verbal understanding that these two suits were to take the same course as the other, and therefore declined to argue them on any other ground, but as opposite counsel in their brief in opposition to that motion on page 38, have entirely ignored that statement, after having it before them for three weeks, without either affirming or denying, and we suppose for some supposed advantage of their own, we are no longer under any obligations to be bound by it, and give them two chances to our own one, and hence will now argue the case as if there was no such agreement. Any other course would not be fair to us.

We will now take the face of the record. If the Court will notice the part of the order of consolidation which they rely on, they will see that it is not all ONE SIDED as opposite counsel seem to think. It is as follows:

"This order is made to save expenses and inconveniences of separate pleadings and trial in each case, and it is not to be construed to the prejudice of either party, and all objections and exceptions are reserved, which could be reserved if said orders, proceedings and pleadings were all separate."

Record p 610-611. Their brief, p 38.

Now these two suits for the taxes of 1896 and 1897 stood in this condition. The pleas were due, in one on the second Monday of January, 1897, and three terms and eighteen months had passed, and no plea or defense, and in the other case one term and six months had passed, and no plea or defense, see special record p 26-29, and no time granted, no affidavit excusing the delay, and no pretense at an excuse for delay in either case. We agreed that they could use the pleas on file in the other consolidated case. They withdraw these pleas.

Now in all fairness we ask this Court, in what position do

they stand before this Court in the two suits for the taxes of 1896 and 1897? They have not even the similitude of the other consolidated cause. In that case certain additional pleas were attempted to be filed to meet the new aspect put on the case as they claimed by the Supreme Court. But what about the two suits for the taxes of 1896 and 1897?

If this Court should reverse the State Supreme Court, what kind of a judgment are you going to enter?

There is but one you could enter, and that is to reverse the decision of that court, deciding that the action of the court in striking out these pleas was proper, and remand the cause to the Mississippi Supreme Court, with instructions to remand it to the trial court with directions to receive these 4th, 5th and 6th pleas, and permit them to be filed, out of pleading time, with no affidavit to the truth of the pleas, with no excuse for the delay, and with no affidavit showing why they were not filed at the proper time.

A most extraordinary proceeding!

IV 14.

That the Court undoubtedly considered the suggestion of errors in preparing the full opinion of November 22nd 1898.

Their brief [redacted] p 35.

We are informed by the judge, who prepared this opinion that this statement is not true in point of fact, but that he was shut out from Jackson during the yellow fever epidemic, and had no access to the suggestion of errors, and has not in fact read or seen it since it was overruled. This is not material, except to correct an erroneous statement, where presumption is asserted as fact. It may afford opposite counsel some comfort to claim that the opinion of November 22nd 1898 was prepared from the suggestion of errors, but it is death to their case. The Court in the full opinion not only had a perfect right to elaborate the holdings of June 20th 1898, but also expressly to give the reasons for overruling the suggestion of errors. They are generally given separately, but that is for convenience,

and there is no reason, rule or law, why they cannot be consolidated into one.

Now if the Court had expressly given its reasons for overruling the suggestion of errors, and at the same term, it is settled beyond controversy or cavil, that this Court will not review any question raised or decided for the first time on a petition for re-hearing. But the further fact in this case was that the Court had decided the case on June 20th, 1898, handed down a summary of its holdings, overruled the suggestion of errors and adjourned for the term on July 1st, 1898, see agreement on file, and this full opinion of November 22nd, 1898, was not filed till the next term, being the special term commencing in November, because the yellow fever epidemic prevented the regular term from commencing on the 2nd Monday of October The holdings of June 20th, 1898, are what we are concerned with, and the full opinion of November 22nd is explanatory of those holdings, and shows the long, patient, and exhaustive examination and attention which the Court had bestowed on the subject in all its phases, and also on other points which it did not decide, record p 675-676, but which if it had decided would most assuredly have cut the plaintiffs in error off from any hope whatever of a writ of error to this Court, and yet the insinuation contained in this allusion, is that the Court tried to study up some way to prevent a writ of error. We submit to this Court, in the light of what the Supreme Court of Mississippi FORBORE to decide that this treatment is very unjust to them.

We think, and think the law is, that if there are other questions decisive of the case, the Court should not decide any Federal question at all, and yet the Mississippi Supreme Court did their best to let the plaintiffs in error into this Court, and the only reason they did not do so, was because there was no Federal question before them to decide.

Baker v Grice, 169 U S pp 284, 291-292

Adams v Bank, 74 Miss 316, where counsel on both sides specially requested the court to decide the constitutional question and they refused.

IV 15.

The certificate of the Chief Justice.

P. 3-4, 36-37

We submit that in this case, there was no trial de novo, and that it was a case where the Supreme Court could simply review, and affirm or correct the action of the court below, that all the errors complained of were necessarily limited to the assignment of errors, there was nothing else to certify to, and the certificate was totally unnecessary, and resulted as unnecessary things generally do in being distorted and used for purposes not intended. It is boldly claimed in their brief that this certificate shows that "the Federal question was raised before final judgment in the appellate court on the first appeal, and months before its final opinion was delivered," etc.

P. 37.

Counsel may attempt to escape by saying that what they said was that the record, IN ADDITION to this certificate showed these things, but that is no explanation at all, for the simple reason that this certificate is used in that connection and does not even assist in showing any such things. This certificate is entitled as follows:

"State of Mississippi.

In the Supreme Court, November Special Term, 1898.

Yazoo & Mississippi Valley Railroad Company, et al,
Appellants.

vs.

Wirt Adams, State Revenue Agent, Appellee.

I, Thomas H. Woods, chief justice of the Supreme Court of Missisippi, at the present time and upon the argument and hearing of the above entitled appeal, do hereby certify:

1st. That upon the said argument and hearing," etc.

Record, p 690-692

And then recites in part what is contained in the assignment of errors, which is before this Court and shows for itself.

This merely certifies as to proceedings on the last appeal. It has no reference whatever to the first appeal or any other proceedings.

A Federal question cannot be raised for the first time after the first appeal, when the Court has settled the principles of the case.

Union &c v Kirchoff, 169 U S 103
Miller v Cornwall, 168 U S 131
Citizen's Sav Bank v Owensboro, 173 U S 643-644

This certificate of the Chief Justice is not controlling with this Court, who on dispute of its accuracy, will look into the matter for themselves.

Sayward v Denny 158 U S 183.

And even considered with reference to the last appeal, we here and now deny its accuracy, except as to the 2nd and 4th grounds of the certificate.

The 4th ground related to the right of removal to the Federal Court, and the 2nd ground says there was specially set up and claimed the right, privilege and immunity under the 14th amendment that the defendant should not be deprived of property without due process of law. We suppose that refers to the 5th and 8th assignments of error that the trial at the July term 1898, and in advance of the full opinion of the Court, and refusing the continuance deprived the defendants of property without due process of law, and yet strange to relate, after obtaining the certificate of the Chief Justice to these things, opposite counsel openly abandon them in this Court, and say that they do not rely on or urge them here.

The serious points in the certificate are the 1st and 3rd grounds which certify that sections 180 and 181 of the constitution of 1890, and the taxation of railroads provisions in the Annotated Code of 1892, and the validity of the Revenue Agent act of 1894, were drawn in question as repugnant to the Constitution of the United States, AND THE DECISION OF THE COURT WAS IN FAVOR OF THEIR VALIDITY.

Record p 690-691.

This we deny.

The only other thing left in the record is the action of the of the trial court in striking out the 4th, 5th and 6th pleas, and the assignment of errors on this point is simply that the court below erred in striking out the pleas, that and nothing more.

Record p 684.

How this could be construed into a savage assault on sections 180 and 181 of the Constitution of 1890, and on the railroad tax provisions of the Annotated Code of 1892, and on the Revenue Agent act of 1894, and the decisions of the Court sustaining their validity, is incomprehensible to us.

The assignment of errors mentions nothing of the kind, the bill of exceptions mentions nothing of the kind, and opinion of the Court mentions nothing of the kind. Where did this terrible struggle take place? 175 U.S. 643-647,

IV 16.

Foreign capital, page 7, 8.

Counsel for plaintiffs in error must be getting things mixed. This is not a political campaign, with gold and silver for the issues, without the knowledge or consent of any other nation on earth.

This is the Supreme Court of the United States, and the question which is attempted to be gotten before it is the provision against the inpairment of contracts, and it is as much the duty of this Court to protect our own people and fellow citizens, as foreigners. Then why try to discriminate? Foreigners are entitled to the equal protection of the laws, and nothing more.

IV 17.

That the Federal questions were raised by the declarations.

Page 32-33.

On similar declarations and bills, this Court on petitions for removal of cases to the Federal Courts have so often decided that no Federal question was raised by the plaintiff, and even

where he expressly tried to raise them for the benefit and accommodation of the defendant, that there is really no excuse for this contention here.

Union & Planter's Bank v Tennessee p 454-458, 464.

See on that in this brief, ante p 20.

The last four declarations say nothing about any charters or consolidations or claim of exemption, but simply aver that the property belongs to the defendants and is liable for the taxes of that particular year, which they have failed and refuse to pay.

Record p 71, 99, 611, 623.

The first declaration does set out all the charters and consolidations, but avers that the property was PURCHASED by the Illinois Central Railroad Company and merged into the Yazoo & Mississippi Valley Railroad Company, which it also owned and controlled, and the exemption has so often been held by this Court to be lost by a sale and purchase that the defendants never even contested it.

Phœnix Ins Co v Tennessee 161 U S 180-181,
and cases cited.

The point we were then making was that the purchase of the stock and bonds of the Louisville, New Orleans & Texas Railway Company by the Illinois Central Railroad Company in its own name, and that of its protege, the Mississippi Valley Company of which it owned all the stock, record p 169-170, to avoid section 197 of the Constitution, was in its real essence and was so intended to be a purchase outright of the said Louisville, New Orleans & Texas Railroad, and the exemption would be lost for two reasons; first because an exemption will not pass in a sale, and second, because the lesser title is merged in the absolute title, as a man cannot own a lien on his own property, and hence the construction debts and all other debts would be merged, and entitled to no pay or interest, but that the sole indebtedness would be the new debt of the Illinois Central Railroad Company for $25,000,000, secured by the new mortgage of

the Yazoo & Mississippi Valley Railroad Company as collateral security.

This the defendants well knew, and instead of raising any Federal question, they simply filed pleas denying the facts, and as these pleas have been all withdrawn, those facts stand confessed and present no Federal question 175-148, 631=632; 643=647,

Record, pp 54, 55-56

And there is nothing left in the declarations raising any color for a Federal question.

There are several other things we might urge here, as the continuous traffic over the exempt and non-exempt portions of the road as shown by the testimony of the general manager, Maj. Edwards, record p 407-409. which is held to forfeit an exemption in Railroad Co vs Maine 96 U S 499, which was not the fact in the Lambert case, and the fact that the Illinois Central Railroad Company owned virtually all the stock and bonds in both the Louisville, New Orleans & Texas Railway, and in the consolidated Yazoo & Mississippi, and besides had virtually all of the directors and officers, and that they were close competing lines, and the Illinois Central Railroad Company could send or withhold business over either line at will, and hence had the absolute power to keep the interest and dividends above the tax-paying point by diverting enough traffic over its own line, &c., &c.

Record p 177.

But this BRIEF is already too long.

The 1st and 2nd assignments of error, saying that the State Supreme Court in its judgment of February 20, 1899, by applying certain tax provisions, impaired the obligation of the contract, and deprived plaintiffs in error of rights without due process of law, attribute to the said Supreme Court what it did not do, and what was not even before it. That tries to bring up things done on the first appeal, all of which are withdrawn, if they ever existed.

The assignments of error, 3-11 inclusive, also make a pow-

erful effort to get into this case questions which were before the State Supreme Court about the 21st section being unconstitutional, and being lost by the consolidation, on the first appeal, and which have been all withdrawn, and are not now before this Court in any shape or form, the writ of error in this case being from the 2nd appeal in No. 9251, in which said court not only did not decide, but had no further jurisdiction of any such questions, and so urgent are they to get in a Federal question, that they have even gone to the length in their 12th assignment of errors of claiming that the Supreme Court could not deny their suggestion of errors, and in their 13th assignment of holding that the Supreme Court violated some unknown Federal law in refusing to strike its opinion from the files. Did you ever?

The 14-19 assignments of error inclusive relate entirely to the four questions we have already argued.

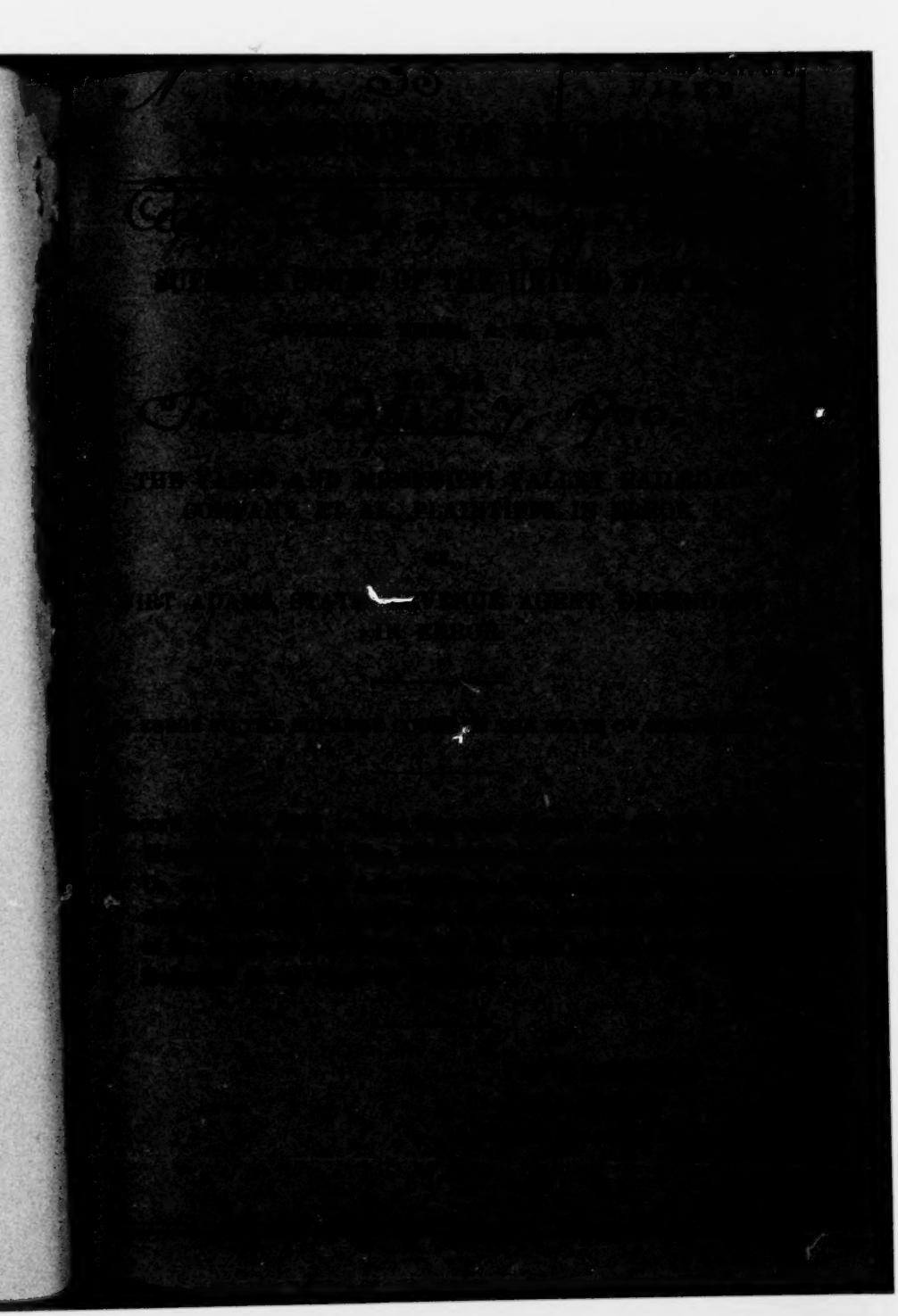
Hence we ask the Court to dismiss this writ of error, or if they cannot do that, then affirm the judgment.

Frank A. Critz

R. C. BECKETT,

ATTORNEY FOR DEFENDANT IN ERROR.

N. B. That the Mississippi Supreme Court had already decided in 55 Miss., p. 114-115 that a privilege tax could not be laid on one of a class and exempt another, but that it must be laid equally on the whole class, and that was affirmed in the Mississippi Mills case in 56 Miss., pp 54-55 and 60, and this was conclusive of this charter granted in [redacted] 1882,



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Record of No. 5513 in the Supreme Court of the State of Mississippi, Styled The Memphis and Vicksburg Railroad Co. vs. J. L. Cocke, Administrator, Reported in 64th Mississippi Reports, Pages 713 et sequitur, and Filed as a Part of the Brief on the Merits of F. A. Critz and R. C. Beckett, Referred to on Page 58 Thereof.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 4, 1900.

1 Supreme Court of Mississippi.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the first Monday, the 4th day, of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Tim. E. Cooper, chief justice, and the Honorable James M. Arnold and the Honorable J. A. P. Campbell, associate justices; Oliver Clifton, clerk of said court, in person and by his deputy, C. C. Campbell; W. C. Harrell, marshal, and Nicholas Francisco, porter.

Proclamation having been duly made, the court proceeded to the dispatch of business.

Afterwards, on the 25th day of April, 1887, the following record was filed in said court in words and figures as follows, to wit:

Minutes, March Term, March 21st, 1897.

STATE OF MISSISSIPPI, }
De Soto County. }

Pleas in and before the hon. circuit court of De Soto county, State of Miss.

Be it remembered that a circuit court was begun and held in and for said county and State at the court-house thereof, in the town of Hernando, on the third Monday of March, 1887, the same being the 21st day of March, 1887.

Present and presiding: The Hon. A. T. Roane, judge of the 3rd judicial district of the State of Mississippi; present also, Maj. T. C. Dockery, sheriff of said county, and T. R. Maxwell, clerk of said court.

The court was opened by the proclamation of the sheriff in the usual form and according to law, and then the following proceedings were had and done, to wit:

Declaration.

STATE OF MISSISSIPPI, }
De Soto County. }

Circuit Court, March Term, 1884.

JNO. T. OWENS }
vs. }
MEMPHIS & VICKSBURG R. R. Co. }

Jno. T. Owens, by attorney, complains of the Memphis and Vicksburg Railroad Co. and demands of them the sum of two thousand dollars for damages sustained by him from said company because

on the 26th day of July, 1883, plaintiff entered into a contract with defendant by which he agreed to do all the work of grading
2 and clearing on section 19 of their said railroad, which is and was located in De Soto county, Miss., and such work was to be done under the instruction of the engineer of said railroad in charge of the work.

And that defendant agreed to pay plaintiff for his work 20 cents per cubic yard for all excavations, 20 cents per cubic yard for all embankments, and 35 dollars per acre for all clearing. Then, in pursuance of said contract, he was put in charge of said section and at once proceeded to work on the same.

That while at work under his contract he obeyed all instructions given him by said engineer in charge; that he furnished and employed all hands, animals, and implements needed for the work or required by said engineer, and that he was able, ready, and willing to go forward and complete his contract, and had provided himself with necessary means of so doing as required by the terms thereof.

Now plaintiff avers that said defendant wilfully and without any cause and in violation of the contract aforesaid took from him a portion of said work on said section 19 and put another person on the same, and refused to let him complete his contract, notwithstanding his ability and readiness and willingness to do the same as he had agreed and was bound to do. Wherefore he says that said defendants have violated their contract, and that he has been thereby damaged to the amount of two thousand dollars, for which he sues and files copy of contract.

WHITE AND MORGAN AND
WITHERSPOON, *For Pl'tff.*

Bill of Particulars.

13,000 cubic yards excavation and embankment *was* taken from him and given to another contractor on which there was and would have accrued to plaintiff a profit of ten cents per cubic yard—$1,300.00.

Filed March 7th, 1884.

T. R. MAXWELL, *Clerk.*

3 EXHIBIT A TO DECLARATION.

Article of Agreement between Jno. T. Owens and Memphis and Vicksburg Railroad Company.

I, Jno. T. Owen, of the first part, do hereby agree to do all the grading and clearing on what is known as section 19 according to instructions given by engineers in charge. M. and V. R. R., of the second part agrees to pay 20 cents per yard for all excavations and 20 cents per yard for all embankments and to pay $35.00, thirty-five dollars, per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at end of each month by engineer in charge to be paid on the 12th of the following month. And at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JOHN T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

Received by J. A. Moore, resid't eng'r, July 26th, 1883.

Summons.

STATE OF MISSISSIPPI, }
De Soto County. }

To the sheriff of said county, Greeting:

We command you to summons the Memphis and Vicksburg Railroad Co. to appear before our circuit court, to sit in De Soto county, at the court-house therefor, on the 3rd Monday of March, 1884, to answer an action exhibited by Jno. T. Owens for the sum of two thousand dollars for breach of contract.

Issued the 7th day of March, A. D. 1884.

T. R. MAXWELL, *Clerk.*

Endorsed: Jno. T. Owens *vs.* Memphis and Vicksburg Railroad Company. Executed by giving true copy to T. H. Owen, section boss, and J. W. Fulton, a conductor on said road, March 11th,
4 1884. T. C. Dockery, sheriff, per W. H. Rollins, D. S.

Pleas.

STATE OF MISSISSIPPI, }
De Soto County. }

Circuit Court, March Term, 1884.

JNO. T. OWENS }
vs.
M. & V. R. R. Co. }

Defendant, by its attorney, comes and defends the wrong and injury & *and* for plea in this behalf says plaintiff ought not to have and maintain his action against this defendant, because defendant says the contract sued on by plaintiff and filed with his declaration was not signed, executed, or delivered by this defendant, and that said contract was not signed, executed, or delivered by any person authorized by this defendant to sign, execute, or deliver the same; and this defendant is ready to verify.

MALONE AND WATSON,
HOLMES CUMMINS, *For Def't.*

STATE OF MISS., }
Warren County. }

Personally appeared before me, an acting justice of the peace in and for said State and county, J. M. Edwards, who made oath that he is the vice-president and gen'l manager of the Memphis and Vicksburg R. R. Co. Affiant further says that the foregoing plea is true, and that the contract sued on and filed with the declaration herein was not signed, executed, or delivered by the Memphis and Vicksburg Railroad Company nor by any person having authority so to sign, execute, or deliver the same for said company.

J. M. EDWARDS,
V. P. and G. M.

Sworn to and subscribed before me this the 12th day of April, 1884.

L. M. LOWENBERG, *J. P.*

And for further plea in this behalf defendant says it does not owe plaintiff the amount in his said declaration mentioned, nor any other amount; and of this defendant puts itself upon the country.

MALONE AND WATSON,
HOLMES CUMMINS,
Att'ys for Def't.

And for further plea defendant says that it did not con-
5 tract with plaintiff as he has in his declaration alleged; and of this defendant puts itsself upon the country.

MALONE AND WATSON,
HOLMES CUMMINS,
Att'ys for Def'ts.

And for further plea defendant says that it has well and truly paid to plaintiff the amount sued for in this action and all other amounts due from defendant to plaintiff; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

Defendant, for further plea in this behalf, says plaintiff, on the — day of ——, 1883, began work on defendant's railroad in De Soto Co., Mississippi, and that — was expressly agreed between plaintiff and defendant that the work which plaintiff had agreed to do, to wit, the grading and clearing of section 19 of said road, situated in said county of De Soto, should be done and completed on or before the — day of ——, 1883, and in case plaintiff failed or refused to complete said work by said time, then defendant was empowered and had the right to take charge of said work at that time remaining unfinished and complete the same at plaintiff's expense and to deduct the amount paid out by defendant for having said work done, completed, and finished from the sum for which plaintiff was

to have received for doing all of said work, and to pay the plaintiff the amount he was to have received for the whole work, less the amount paid out by the defendant for that portion of the work for which plaintiff had failed to do and perform, and defendant avers that plaintiff did fail and refuse to complete and finish said work by said time, whereupon defendant, as it had the right to do, finished and completed — at the expense of plaintiff, and deducted the amount which they necessarily expended in having said work completed from the amount to which plaintiff would have been entitled in case he had done the whole of said work and paid to plaintiff the balance which they had the right to do; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

6 Defendant, for further plea in this behalf, says plaintiff on the — day of ——, 1883, began work on the defendant's railroad in De Soto county, Miss., and that it was expressly agreed between plaintiff and defendant that the work which plaintiff had agred to do, to wit, the grading and the clearing of said section 19 of said road situated in said county of De Soto, should be done on or before the — day of ——, 1883, and in case plaintiff failed or refused to complete said work by said time, then defendant was to have the right to take charge of and complete the same and pay plaintiff only for the work actually performed by him. Now, defendant avers that plaintiff failed to complete said work by said time, although often thereto urged and requested by defendant, and therefore defendant, in accordance with the understanding and agreement between plaintiff and defendant, took charge of said work and completed the same and paid for the work done by him as had been mutually agreed, understood, and contracted between them; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

And for further plea in this behalf defendant says that in the months of July and August, 1883, plaintiff did certain work and labor on a portion of defendant's road-bed in De Soto county, Miss., in grading and clearing on section 19 of said road, which is the same work referred to by plaintiff in his said declaration, and that afterwards, to wit, on the — day of ——, 1883, defendant and plaintiff had a full settlement of all amounts due from defendant to plaintiff and of all the things and matters in dispute between plaintiff and defendant, and that plaintiff then and there accepted and received from defendant in full discharge of all its liabilities to him the sum of —; and this defendant is ready to verify.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def'ts.

And on all the foregoing pleas plaintiff joins issue.

WHITE AND MORGAN, *For Pl'ff.*

Filed July 23rd, 1884.

T. R. MAXWELL, *Clerk.*

7 In Circuit —, De Soto County, Mississippi.

JNO. T. OWENS
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

And the said defendant, by leave, etc., comes, and for further plea says that this defendant did not construct nor employ others to do so for any of said line of railroad. This defendant has not done any work whatever on said lines of road, nor any other road, but that said line of railroad upon which the plaintiff claims to have done certain work about its construction and about which said contract mentioned in his declaration was made was wholly built and all the work in the construction thereof was done for the New Orleans, Baton Rouge, Vicksburg — Memphis Railroad Co., a railroad company organized under the laws of this State, and therefore this defendant did not so contract, as the plaintiff avers. Wherefore and etc.

HOLMES CUMMINS,
MALONE AND WATSON,
Att'ys for Def't.

Plea filed by leave March 18th, 1885.

T. R. MAXWELL, *Clerk.*

And afterwards, to wit, on the 29th day of March, 1887, same being a day of the regular March term, 1887, of said court, the following proceeding was had in said cause and entered of record in said court, to wit:

Judgement.

J. L. COCK, Adm's of Jno. T. Owens, Deceased,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

Come the parties, by their att'y; come also a jury of good and lawful men, — wit, J. M. Chamberlain and eleven others, duly elected, empanneled, tried, and sworn to well and truly try the issue joined in this case, who upon their oaths say they find for the plaintiff the sum of $400.00. It is thereupon ordered by the court that plaintiff do have and recover of defendants the said sum of ($400.00) four hundred dollars, with six per cent. interest until paid, and the costs of this suit, for which execution may issue.

8 *Bill — Exceptions.*

In Circuit Court of De Soto County.

J. L. COCKE, Admin-strator of Jno. T. Owens, Dec'd,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY.

Bill of exceptions.

Be it remembered that on the trial of this cause the following proceedings were had and done, to wit: Plaintiff, first havind proved the death of Jno. T. Owens and that he had testified as a witness on a former trial of this cause, next proved that said Owens on said trial testified as follows: JNO. T. OWENS testified that he had a contract with the defendant to do certain work in constructing its road-bed in De Soto county on that portion of the road known as section 19. The contract filed with his declaration is the contract entered into by the parties. This contract was made with J. A. Moore, a cival engineer in employ of defendant and in charge of that portion of the work. After witness had done a portion of work under this contract, he took it, together with estimates made by Moore, to the office of H. C. Derrick, in the city of Memphis, whom he understood was the chief engineer of defendant. Derrick saw the contract and received the estimates. Plaintiff called again in about a week or ten days and Derrick paid him the money due. Witness had charge of the county convicts of De Soto and adjoining counties and did the work with these and other hands he employed on the road for the purpose of doing this work. Witness had bought eight or ten scrapers and furnished himself with the teams necessary to do it. He had for several days about twenty-five hands, and afterwards increased the number to thirty-five. Labor was plentiful and witness could have obtained all the hands he wanted from one dollar to one dollar and a half a day. There was a clear profit to witness by doing work, as per *per* terms of his contract, of ten cents per each cubic yard. Witness did not understand that he had the whole of section 19. The work that he had to do was staked by the engineer, and he had done very near half of it when stopped by the company. Witness had done about –,500 yards of work, and he estimates that about 13,000 yards remained to be done under his contract. There was a long trestle on
9 section 19, about centre of witness' contract. He did all the work south of this trestle, but none north of it. The ground north of this trestle is what is known as "buckshot land." Much of the land south of the trestle where witness worked was of the same character of land. Witness thinks that two-thirds of the ground in which he did work was of this character. On the south end of this section was a mound or high place, and my work was to cut through this, using the earth taken out of the cut in the fill towards the trestle. Witness got pay for all the work done by him.

The work let to me by Moore under this contract was about a half a mile.

Witness was never notified by defendant that his work was not progressing in a satisfactory manner. He was never notified or directed to hasten the work or to put on more hands. Had he been so notified he could have put on all the hands desired, as labor was plentiful and men was constantly applying for work.

Cross-examined:

After witness quit work on section 19 he sent his team and scrapers and some of his hands further down the road, and did work on sections 21 & 23. The other hands he sent to the bottom, to his farm in Tunica county. It is not true that the convicts were unable to do full work. Witness never measured the work that on his contract he was prevented from completing, but he estimates it at 13,000 yards.

Plaintiff next introduced the contract between him and the defendant:

Contract.

Articles of agreement between Jno. T. Owens and Memphis and Vicksburg railroad.

I Jno. T. Owens of the first part do hereby agree to do all the grading and clearing on what is known as section 19 according to instructions given by engineer in charge. M. & V. R. R. of the second part agrees to pay 20 cents per yard for all excavations 20 cents per yard for all embankments and to pay $35.00 thirty-five dollars per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimates given at the end of each month by the engineer in charge to be paid on the 12th of the following month. And at the completion of the contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

Received by J. A. Moore, resid't eng'r.

10 Plaintiff next introduced the statement of estimates of work done for defendants in words and figures as follows, to wit:

M. & V. R. R., 3d Residency.

Copy of Jno. T. Owens, August, 1883.

C. yds., sec. 19, 2,587, earth excavation, 20.....	517.40
4,403, " embankment, 20...	880.60
6,990	
3.42 acres clearing, 35.00.....	119.70
Total to date..	1,517.70
Deduct previous estimate.....	565.00
Estimate in August...	952.70
Ten per cent. reservation.....	95.27
Am't due..	857.43

O K.
J. A. MOORE, *R. E.*

Copy.

Plaintiff next introduced the disposition of George T. Smith and Cyrus Smith as follows:

Deposition of Geo. T. and Cyrus Smith.

To the circuit court of De Soto county:

JNO. T. OWENS
vs.
M. AND V. R. R. Co.

Interrogations for Geo. T. Smith, Cyrus F. Smith, and Dr. W. P. Connor, witness for plaintiff in above case.

Ques. Do you know the parties of this suit?
Ans. We know Jno. T. Owens and the location of the M. & V. R. R.
2nd Ques. Do you know J. A. Moore, an engineer formerly in the employ of the defendant?
Ans. We do.
3rd Ques. What work did he super-tend?
Ans. He super-tended work extending some distance beyond Norfolk trestle and some distance below Indian creek.
4th Ques. Where did he stay and keep his office?
Ans. At Star Landing, De Soto Co., Miss.
11 5th Ques. Did you know Jno. T. Owens while engaged at work on section 19?
Ans. We did.

6th Ques. Who was employed at that time to super-tend the work?

Ans. J. A. Moore.

7th Ques. Did you ever hear J. A. Moore while so employed speak of Jno. T. Owens as a contractor?

Ans. We did, and was present when contract was signed.

8th Ques. Repeat what he (J. A. Moore) said as to how Owens did this work and carried out this contract.

Ans. He (J. A. Moore) stated that Owens did best work that was done on his section, and was carrying out every agreement of his contract when Donnelly and Co. was put on this (Owens) work.

9th Ques. What did he (Moore) say as to how Owens had been treated in this matter?

Ans. He said that the contract had been taken from Owens with cause, and that he (Owens) had been badly treated.

10th Ques. Did you not hear J. A. Moore say that he was authorized both verbally and by letters to *by* Derrick, engineer in charge of north division of road, to let the contract to Jno. T. Owens?

Ans. We did.

11th Ques. Did you not know of his making other contracts on his (Moore's) with other parties?

Ans. We did.

12th Ques. At what time did the conversation take place with Moore in regard to work done by Owens?

Ans. During the time that Owens was fulfilling the contract and afterwards.

13th Ques. Was Moore in the employ of the road at the time that the above conversation took place?

Ans. He was.

12

GEO. T. SMITH.
CYRUS F. SMITH.

STATE OF MISS., }
De Soto County. }

Before R. L. Dabney, justice of the peace of said Co., this day personally appeared Cyrus F. Smith, and, being duly sworn, says that the answers to the within questions are true as stated.

—— ——.

Sworn to and subscribed before me this Sept. 20th, 1884.

R. L. DABNEY, *J. P.*

Sworn to by G. T. Smith this 22nd Sept., 1884.

R. R. WEST, *Clerk.*

Defendant thereupon accepted to the reading of interrogations 8, 9, 10, and 11 and the answer- thereto, and asked the court to exclude the same from the consideration of the jury on the ground:

1st. That it was heresay evidence.

2nd. Because the agency of Moore could not be proved by his own declaration.

3rd. Because the answer to the 9th interrogatory was not a statement of fact, but an expression of opinion of Moore, and calculated to mislead and prejudice the jury; which exceptions were by the court overruled and the testimony admitted; to which action of the court defendant at the time excepted.

Plaintiff next introduced the deposition of CLARENCE D. OWEN, which was read to the jury, in words and figures as follows, to wit:

To the L., N. & T. R. R. Co. or Watson & Malone, attorneys of record:

Ten days after notice we will apply at the office of the circuit clerk of De Soto county for *for* a commission to take deposition of C. D. Owen, a witness for plaintiff, in issue pending in said court, wherein J. L. Cocke (administ'r of Jno. T. Owen) is plaintiff and you are defendant.

Ques. I. Do you know the parties to this suit, and what is or what was your relation to Jno. T. Owens?

Ques. II. Do you know anything of a contract which he had with defendant to do work on section 19 of their railroad in De Soto county? If so, state how you obtained your information.

Ques. III. Were you not employed by Jno. T. Owens to assist him in doing this work?

13 Ques. IV. What force did you have at the time the contract was taken from him? State whether or not if he was getting along well.

Ques. V. Do you know whether or not at the time he was getting forward with his work to the satisfaction of Mr. Moore, the engineer in charge?

Ques. VI. If you are sure that he was doing so, state how you know it and what you may have heard Moore say about it.

Ques. VII. What profit was made by your brother on the work done by him? State how you know it. State also what would have been his profit on the remainder of the work of said section 19 if he would have been allowed to finish it.

Ques. VIII. State whether your brother was in condition to get more hands if he had needed them or he had been requested to increase his force.

Ques. IX. Did you keep the books that show the costs and profits on the work done on section 19 by Jno. T. Owens. If so, state where they are. State whether or not your estimate of costs is made from your recollection of what books showed.

Ques. X. State anything that you may know that will benefit the plaintiff or throw light on this cause.

WHITE AND WITHERSPOON.

Reserving exceptions for incompetency and irrelevancy, defendant propounds the following questions:

X Int. 1st. How much work did Jno. T. Owens do on the railroad and what kind of work did he do?

X Int. 2nd. What was the character of the soil where the work was done?

X Int. 3rd. How much earth per day could one man move and put into the embankment?

X Int. 4th. How much earth could one man move from the cuts in the road?

X Int. 5th. How far did the earth have to be carried to make the embankment or fills?

X Int. 6th. What was the length of section 19, and how much work was necessary to be done there so — to prepare it for the laying of the cross-ties and rails? How long would one laborer have in doing the necessary work? Was the work done by Jno. T. Owens on the north or south side of the trestle in section 19?

MALONE AND WATSON, *For Pl'ff.*

Answers of C. D. Owens to Interrogatories and Cross-interrogatories Propounded to Him in This Cause.

Ans. 1st. I know the parties to this cause. Jno. T. Owens was a brother of mine, and I was employed by him to assist in doing the work on section 19 of defendant road.

Ans. 2nd. I knew of the contract; have seen the same and read it.

Ans. 3rd. I was so employed.

Ans. 4th. At the time the contract was taken away from him he had a full line of teams and implements; also a force of thirty-five hands. He had at first a force of twenty-five and afterwards increased it to thirty-five hands; in fact, he had a sufficient working force to have completed the work on the north side of the trestle in ample time to meet the purposes of the company. He was therefore discharged without any cause whatever.

Ans. 5th. He was getting on well, as above stated, and to the satisfaction of the engineer in charge.

Ans. 6th. I know that he was getting along well and have heard Moore state that his work was entirely satisfactory.

Ans. 7th. He made a profit of 13 cents per cubic yard on the work done by him as estimated by us, and we estimated the profit — the work north of the trestle at 7 cts. per cubic yard; the profit on the north side would not have been so great as that on the south side on account of a difference in the soil.

Ans. 8th. John worked some convict labor. Hands were plentiful and applied to him almost every day for employment. He could have increased his force at any time had the company so desired, but they never at any time intimated that the work was not progressing sufficiently fast or that it was in any way unsatisfactory. On the other hand, it was considered as good, if not better, than any work on the line.

Ans. 9th. The books were kept by me in my room at Helena, Ark., and were burned in fire at that place. So John and I made the calculation from the books before they were burned, and estimated the amount of work taken away from him at 13,000 cubic yards, at the profit of 7 cts. per cubic yard.

15 Ans. 10th. He completed the work of the south side of the trestle on section 19 to the entire satisfaction of the company and was ready and anxious to commence work on the north side when they discharged him. After the company had refused to let him complete the work on section 19 he carried about half of his hands on section 21 and 22 and sent the balance to his farm, in Tunica county, Miss.

Ans. to X Int. 1st. He did about 10,000 yards of embankment and cuts.

Ans. to X Int. 2nd. As a rule it was a light, sandy soil, but there was some buckshot.

Ans. to X Int. 3rd. Twenty cubic yards.

Ans. to X Int. 4th. Same as above.

Ans. to X Int. 5th. Different distances; some of it had to be hauled nearly 500 yards.

Ans. to X Int. 6th. I do not know the length of section 19 nor the amount of labor necessary to prepare it for the track. I cannot say how long it would have taken one laborer to have completed it.

Ans. to X Int. 7th. Jno. T. Owens' work was on the south side of the trestle.

Plaintiff then closed his case.

Defendant then introduced the deposition of JAMES M. EDWARDS in words and figures as follows, to wit:

JNO. T. OWENS
v.
M. AND V. R. R. Co. } Pending in the Circuit Court of De Soto County.

We agree that this deposition may be taken by any officer authorized to administer oaths in the State where taken, without commission or formalities as to time, copies, etc., reserving only objection for relevancy or competency, and may be so read.

WHITE AND MORGAN, *For Pl'ft.*
MALONE AND WATSON, *For Def't.*

In the Circuit — of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. AND V. R. R. Co.

Interrogatories to be Propounded to James M. Edwards, Witness for the Defendant.

1st. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected? And, if you know, say who had charge of said work, particularly section 19—under what engineers, etc., etc.

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith filed as Exhibit "A" and say whether J. A. Moore or any other person had authority to make such a contract for the defendant.

5th. What officers of defendant, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of the plaintiff having done work on said section 19; within what time, if any, was he to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now suing for or about his doing said work on said section? If so, relate all that he said, giving time and place and in whose presence and any letters from about same.

8th. What monies, if any, and where, — paid the plaintiff on the work that he did on said section, and did he give any receipt therefor? If so, please attach it to your deposition as an exhibit.

9th. If you can, please exhibit a profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did and what payments were made him therefor. Then also state what force of men he had on the work when the same was taken from him; whether plaintiff was building said work as rapidly as
16 required by defendant; why taken from him, to whom let for completion, at what price, and how much was paid in all to such other party for so completing the same; within what time such other party completed the work, how much was done by such other party, etc.

10th. What, if any, requirements do you know were made of the plaintiff as to completing the work on said section by any given time? State all you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Was any contract similar to that set out in said exhibit hereto ev-r made by you or any other person authorized — and for defendant to do so with plaintiff about said matter? Again, say what is meant by the endorsement "Received by" J. A. Moore, resident engineer.

12th. Did the plaintiff have the men, animals, and implements needed for the completion of said work and required by the engineer in charge, and did he obey all instructions given by the engineer in charge?

EXHIBIT A.

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and M. and V. R. R.

I, John T. Owens, of the first part do hereby agree to do all grading and clearing, on what is known as section 19, according to instruc-

tions given by engineer in charge. M. & V. R. R. of the second part agree to pay 20 cts. per yard for all excavations, and 20 cts. per yard for all embankments, and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by engineer in charge, to be paid on the 12th of the following month, and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG
RAILROAD.

July 26th, 1883.

Received by J. H. Moore, resident engineer.

X Interrogations for J. M. Edwards.

1st. Who was in charge of the work on section 19 when this contract between plaintiff and your company was made, and how long did he continue as such engineer after date of it?

2nd. When were you first informed that your engineer, Moore, had made the contract with plaintiff?

3rd. When you were informed that plaintiff was a contractor on your road, did you not pay him per estimates on section 19, given by J. A. Moore, the engineer who made the contract?

4th. If Moore was not authorized to contract for work on your road, why did you pay money to parties contracting with him on such contract?

5th. Did not J. A. Moore make other contracts for you for work on your road? If so, give the name of any person with whom such contracts were made.

6th. Were such contracts in writing? If so, annex copies of the same.

7th. Did you order the contract with plaintiff annulled? If so, for what reason?

8th. Do you, of your own knowledge, know any reason why said contract should have been annulled? If so, state it.

9th. Did not other resident and assistant engineers of your road make contracts for work on your road with parties?

10th. Do you know, of your own knowledge, why plaintiff did not complete the work on section 19?

11th. Do you know how long it was from the time other laborers were put on plaintiff's work before the track was put down on it?

WHITE AND MORGAN, *For Pl'ft.*

17 The deposition of James M. Edwards, a witness on the part of the plaintiff in the case of Jno. T. Owens *vs.* Memphis and Vicksburg Railroad Company, noe pending in the circuit court of De Soto county, State of Mississippi.

In pursuance of the foregoing and annexed commission to me directed, I, T. R. Foster, a justice of the peace for the county of Warren. Miss., caused the same (James M. Edwards) witness to come before me, in the city of Vicksburg, county of Warren and State of Mississippi, at 11 o'clock a. m. on the 8th day of September, 1884, which said witness, after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, so help him God, testified as follows:

Ans. to first Int. My name is James M. Edwards. I am thirty-five years old. I am vice-president and gen'l manager of the Louisville, New Orleans and Texas Railway Co.; residence, at Vicksburg, Warren county, Miss.

Int. 2nd. I have been and since the beginning of the work in 1882 and still occupy the position of superintendent of construction of the line of railroad from Memphis to Vicksburg, Mississippi, and have been and am still the vice-president and gen'l manager of the Louisville, New Orleans and Texas Railway Company and of the companies which were consolidated under this name, one of which companies was the defendant's company. Mr. R. H. Elliott was the principal assistant engineer, having charge of the entire work under me from Memphis to Vicksburg, and Mr. H. C. Derrick, the division engineer under him, for the first fifty (50) miles south of Memphis, in which is section 19, nineteen.

Burke, Foley and McMahon were the contractors of 50 miles of work, commencing at section sixteen (16) and embracing the fifty (50) miles next south. There was no contract on this part of the work with the defendant company. The contract with Burke, Foley and McMahon was made with the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, another company, and incorporated in Mississippi and now consolidated into the Louisville, New Orleans and Texas Railway Company; and this fifty miles of the road was constructed under the charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company.

I append as an "exhibit to answer" a copy of the contract made by Burke, Foley and McMahon. (Such exhibit is marked "Exhibit A.")

The Financial Improvement Company, a corporation under the laws of Colorado, made a general contract for the construction of the line of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and all payments for the construction of the line of this company were made by the Financial Improvement Company and receipts given by different contractors for estimates paid from time to time.

Ans. 3rd. They had no authority to make contracts for construction unless especially authorized by me. All construction contracts were made by me for the Memphis and Vicksburg Railroad Com-

pany, I being the only person authorized by the directors of this company.

Ans. to Int. 4th. I have examined the paper referred to, and J. A. Moore or no other person except myself had authority to make any contract for defendant company.

Ans. to 5th Int. No officer except myself was authorized to make such a contract or other contract for construction.

Ans. to 6th Int. Burke, Foley and McMahan having the contract and failing to complete it in the time required, notice was given to H. C. Derrick, division engineer, to put a company's force upon section 19 in order to complete it before the track reached it. There were a number of bills paid for work done on section 19, one of which was to J. T. Owens. The fact that Owens was paid was all I know of his having done work on section 19. So far as I know, Owen was nothing but a laborer on the work, and was subject entirely to the order of the company, and therefore had no contract giving him time to complete work. After having given this first notice to Mr. Derrick, I went up to Memphis, and still not finding the work progressing rapidly enough, I instructed Mr. Derrick to put an additional company's force on the works, and he then took the labor and team of Donnelly and Co. and put them upon
18 the work, and the company paying for the same at day-labor rates until the completion of the work, and the whole expense charged to Burke, Foley and McMahon under their contract, they getting credit for the work done at contract prices. There was no forfeiture of any contract with plaintiff declared, because there was no contract made with him.

Ans. to Int. 7th. I don't know plaintiff and do not remember to have ever had any conversation with him.

Ans. to Int. 8th. Some money was paid to Owen in the manner I have stated above. These payments were made through Mr. Derrick, the division engineer, who paid all the laborers put upon this work. If any vouchers were given by plaintiff they must have been given to Mr. Derrick, and in our settlement with Burke, Foley and McMahon such vouchers were turned over to them, I think, as receipts for money paid on their account.

Ans. to Int. 9th. It will be impossible to exhibit such a profile. The division engineer could possibly do so; if not, no one can. I cannot give a detail statement of work done by plaintiff, nor what list of payments were made therefor, for reasons given above. On December 22nd, 1884, I made a final settlement with Burke, Foley and McMahon—that is, that the amount due them at that date was completed, and vouchers forwarded to Memphis for receipt and signature. This voucher, after being signed, was forwarded to New York. (I append herewith a copy of this voucher, marked "Exhibit D.") The date of the signatures being blank, because at the time impression copy in this office was taken the parties were not here to sign said vouchers. In the item "amounts paid to others" in this voucher, the amount paid to Owens is included, but we have no detail statement of these amounts for the reason stated.

Ans. to Int. 10th. So far as I know of, no time was given plaintiff

to complete the work, because he was not a contractor. All of my contracts were limited as to time, it having been the policy of the company to complete all work as speedily as possible.

Ans. to Int. 11. No similar contract that made exhibit hereto was ever made by me or any other person authorized by me. I have no idea what the words "Received by J. A. Moore, resident engineer," mean, unless they mean that the proposition of Owens was received by Mr. Moore, the resident engineer, to be forwarded to the proper officer to be re-accepted or rejected.

Ans. to Int. 12th. I do not know the plaintiff on the work, but know that there were not sufficient men, animals, and implements to complete the work in the time required for the track, and I instructed Mr. Derrick to put the forces of Donnelly and Company on the work as stated above.

Ans. to Cross-interrogatories.

1st. Derrick, division engineer, was directly in charge of the work; he continued until about January, 1884.

Ans. to Cross-int. 2nd. I knew nothing of the so-called contract until after the suit of Owens was brought.

Ans. to Cross-int. 3. As stated in last answer, I never knew that plaintiff claimed to be a contractor on our road until after suit was brought, and any money paid him was not paid him on estimates as a contractor, but upon memoranda receipts as company force.

Ans to Cross-int. 4th. Owens was simply paid upon the statement made by Moore and approved by Mr. Derrick as a company's force put upon the work of Burke, Foley and McMahon.

Ans. to Cross-int. 5th. I know of no such contract; certainly he had no authority to make any such contract.

Ans. to Cross-int. 6th. I have answered this in my last.

Ans. to Cross-int. 7th. There was never any contract made with plaintiff annulled.

Ans. to Cross-int. 8th. I have answered this in my last.

Ans. to Cross-int. 9th. Not that I know of; certainly not, unless specially authorized, of which I have no remembrance.

Ans to Cross-int. 10th. I know nothing of the plaintiff on this work, except as the company's laborer.

Ans. to Cross-int. 11th. I think the laborers put on the section 19 (19) by the company had just about completed the work when the track reached them.

19 JAS. M. EDWARDS.

All of which testimony I caused to be reduced to writing, and said witness (James M. Edwards) after having read the same over to him signed the same in my presence at the time and on the day mentioned in the caption.

All of which I certify under my hand and seal this 9th day of September, 1884.

T. R. FOSTER,
Justice of the Peace.

These articles of agreement, made and concluded this 18th day of December, in the year of our Lord, one thousand, eight hundred and eighty-two, and between C. C. Burke, Thos. Foley and Michael McMahon, under the firm name of Burke, Foley and McMahon, of the first part, and the New Orleans Baton Rouge, Vicksburg and Memphis R. R. Co., of the second part; witnesseth: That for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said railroad company, the said parties of the first part do hereby covenant and agree to construct and finish in the most workmanlike manner to the satisfaction and acceptance of the engineer in charge of the same, all the graduation as included in specifications under said general head as below given on fifty miles of said railroad, commencing at section sixteen, south of Memphis, and embracing fifty miles next south. And such other work connected therewith as may be necessary to complete said graduation in accordance with the following specifications, so far as they may be applicable, and agreeable to the directions of said engineer in charge of said work, given from time to time during the progress thereof, and to begin said work on or before — day of —— and to complete the same on or before the 1st day of July 1883, it being expressly agreed that the time herein stipulated shall be of the essence of this contract.

Specifications.

Graduation.

Under this general heading will include clearing and grubbing, excavations and embankments required for formation of road-bed, turnouts, and depot grounds, foundations for masonry and trestle-work, or in any way connected with, or incident to, the construction or drainage of the same, or, the change or crossing of the roads or streams.

I. Clearing and grubbing.—Grubbing will be required the entire width of the road-bed, and in all excavations and embankments which are two feet or less in depth; also, in all slopes, when the safety of the road requires it.

The clearing shall be made the entire length of the road wherever required, and shall not be less than one hundred (100) feet in width on the regular road-bed, and as much more as in the opinion of the engineer will be required for the safety or convenience of the road. The ground on which the embankments and excavations are made, shall be cleared of all vegitable and perishable matter. All stumps must be cut close to the surface and none left within two feet of grade in embankment. Fences, buildings, and wood on the line of road, are the property of the railway or land-owner. If not removed by the owner within a reasonable time, they shall be cleared off by the contractor, piled up and preserved for the use of the owner or railway, without charge. The clearing and grubbing shall be paid for by the acre, on the area actually covered by the timber.

II. Width of roadway.—The roadway will be graded eighteen

(18) feet wide in excavation, and fourteen (14) feet wide in embankment, except when otherwise ordered by the engineer in charge.

III. Slope.—The slopes of excavations shall be generally three-fourths horizontal to one vertical, and of the embankments one and one-half horizontal to one vertical. These are, however, subject to such modification as the engineer may direct. All slopes shall be made true and even.

IV. Ditching.—Whenever required by the engineer, ditches shall be cut beyond the slope of both excavation and embankment, of such location and dimension as he may direct.

V. Excavations.—Excavations shall include all material
20 taken from cuts, ditches, channels for creeks, road crossings, and foundations not under water. The classification of all excavation shall be as follows: Earth will include clay, sand, gravel, loam, hard pan, decomposed rock, and slate stones, and boulders containing less than one cubic foot, and all other material of an earthly kind.

Loose rock.—Loose rock will include all stone and detached rock found in separate masses, containing not less than one cubic foot, nor more than one cubic yard; also all slate or other rock, soft enough to be removed without blasting, although blasting may be resorted to.

Solid rock.—Solid rock will include all rock in masses of over one cubic yard, which cannot be removed without blasting.

VI. Embankments.—The embankments to be formed fourteen (14) feet wide on the top, unless otherwise directed, with slopes generally of one and one-half horizontal to one vertical. Whenever the embankments are formed from burrow pits, or ditching on either side, such burrow pits, and ditching, and the crest of the slopes thereof, shall in no case approach within six (6) feet, nor in double the depth of the ditch, of the foot of the proper embankment slopes. Whenever water-courses, or new channel for rivers require to be formed, they shall be put at such distance from the foot of the slope as the engineer may direct. Care must be taken to exclude all perishable material from the embankments. Embankments shall be built according to the instructions of the engineer, either by dumping from grade, or in layers of such thickness as he may require. Such additional height above grade, usually one-tenth of the amount of the fill, shall be given to embankments as the engineer may deem necessary to compensate for shrinkage. Embankments about masonry shall be built at such time and in such manner, and of such material as the engineer may direct.

Embankments shall be riprapped with stone, or otherwise protected against damage by water-courses, by turning the stream, or making new channel if required.

VII. Hauls.—

VIII. Trestle-work.—Trestle-work will be built of good sound yellow pine, or cypress as directed by the engineer, and to be either piled or framed as per plans and specifications furnished by him. Trestle-work will be paid for per lineal foot, and the price paid will

include all bolts, washers, spikes, or other material necessary to complete it as per plan furnished.

General conditions applicable to all work.

The railroad company reserves the right to make any changes in the alignment or grades of its road, or of the plan of its work; provided however, that the contractor shall be paid at the contract price for the work actually done before changing, and also, for the additional work embraced in the change.

The monthly estimate of the engineer shall be subject to correction by him in any subsequent or final estimate. The monthly estimate being merely made out as a basis of payment on account, it will necessarily be only approximately correct as to quantity and value, pains being taken however, to make them as accurate as possible. The contractor shall render an account monthly, through the proper superintending engineer, of any work which he may have been authorized to do; and to prevent dispute thereafter, it is hereby understood that, no bills for extra work will be allowed without sufficient evidence of the work having been properly authorized, and of the bills having been examined and approved by the engineer.

All the material used in the road will be subject to the inspection and acceptance of the engineer, who will submit them to such tests ad he may desire.

Commodious passing places for public and private roads, shall be made and kept in good condition by the contractor; and he shall provide and maintain good and sufficient fences for keeping up inclosures, and the preservation of crops. The contractor will be held responsible for trespass or damages to the adjacent properties, or the public for any acts or omissions on the part of himself or his employees.

Any parties, under the direction of the engineer, shall be permitted to pass or haul any material required for the road,
21 over any section; such persons not interfering with the work of the contractor. Right of way and necessary lands for burrow pits, spoil banks, ditches, roads etc., will be provided by the railroad company as early as practicable; but they are not to be held responsible for any delay caused by lagal proceedings beyond their control.

Contractors must carefully preserve bench marks and stakes; in case of neglect they will be charged accordingly. Falls and slips, if not occasioned by the contractor, are to be paid for the same as regular classification.

The contractors shall take all risks from floods and casualties of every description, and shall make no charge for detention from such causes.

The quantities marked on the profile are an approximation and will not govern the final estimate.

Disorderly and quarrelsome persons must be discharged by the contractor if, in the opinion of the engineer, the good of the road requires it.

Contractors will not themselves, nor by their agent, give nor sell any ardent spirits to their workmen, or any person at or near the line of railway; nor allow any to be brought on the works by the laborers or other persons, and will do all in their power to discountenance their use in the vicinity of the works by persons in their employ; and they will not allow any person in their employ to commit trespass on the premises of persons in the vicinity of the works, and will forthwith, at the request of the engineer, discharge from their employ any that may be guilty of committing damage in this respect.

Contractors must satisfy themselves of the nature of the soil; of the general form of the surface of the ground, of the quantity of material required for forming the embankments, or other work, and all matters which can, in any way, influence their contract; and no information upon any such matter derived from the maps, plans, profiles, drawings, or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all the terms of this contract.

The contractor- will remove, at their own expense, any materials disapproved by the engineers, and will remove and re-execute any works, without extra charge, and within such time as fixed by the engineer, appearing to him during the progress, or within twelve months after completion, to be unsoundly or improperly executed, notwithstanding any certificate as — the due execution of the same. On their default such work will be done by the railroad company at the contractor's expense. The contractor shall give personal attention to the work.

The engineer shall have power to direct the application of force to any portion of the work which, in his judgment, requires it, and to order the increase or diminution of force at any point he may indicate.

Now therefore, this agreement further witnesseth: That the party of the second part agrees to pay, or cause to be paid, at its office in Vicksburg, to the party of the first part, for the faithful performance of the work embraced in this contract, the following prices, to wit:

For earth excavation per cubic yard, twenty (20) cents.
For solid-rock excavation per cubic yard, one dollar.
For loose-rock excavation per cubic yard, fifty (50) cents.
For embankment per cubic yard, twenty (20) cents.
For grubbing and clearing per acre, thirty-five (35) dollars.
For frame trestle per lineal foot, ——.
For extra work not specified cost and ten (10) per cent.

The above payments shall be made in the following manner, that is to say, during the progress of the work, and until it is completed, there shall be monthly estimates made by the engineer in charge, of the quantity, character and value of the work done during the preceding month, or since the last monthly estimate, ninety per cent. of which value shall be paid by the party of the second part, to the party of the first part, between the 10th and 15th of the following month; and when the whole is completed under this contract,

then the party of the first part shall be entitled to the final estimate of his work, and shall be paid in full for all work done, upon his signing a full release to the party of the second part from all
22 claims or demands whatsoever growing, in any manner, out of this agreement.

It is further agreed and understood, that the party of the first part shall be entitled to no damages from delays which may be occasioned by the party of the second part, but for such delays a reasonable extension of time for the completion of this contract shall be made, provided however, that written demand for such extension be made by the party of the first part at the time such delay was occasioned.

This agreement further witnesseth: That should the party of the first part not begin the work herein contracted for at the specified time, or after beginning it should the work be stopped, or not prosecuted with such force and dispatch as, in the opinion of the engineer, is requisite for its completion within the time specified, then the party of the second part may give notice in writing to the party of the first, either in person, or to his agent, or by posting in a conspicuous place on the work, to put a necessary force upon the said work at once, and if the same has not been done within ten days after such notice has been given or posted, then the party of the second part shall have the right to declare this contract forfeited, and may proceed to relet the work herein specified at such prices as may be necessary for its completion at the time specified in this contract, and thereupon the party of the second part shall have the right to appropriate all unpaid estimates and reservations from monthly estimates in its hands or so much thereof as may be necessary to the payment of the increased price, if any, at which it may be necessary for the company to relet said work, in order that it may be finished in the time specified herein, and all damages which the said party of the second part may have sustained, by reason of the default or failure of the party of the first part; and if said unpaid estimates and reservations are not sufficient to make such payments, then the party of the second part shall have the right to proceed against, and recover of the party of the first part, and his guarantors, the amount necessary to cover such balance.

In witness hereof, the parties of the first and second parts have hereunto set their hands and seal- this 18th day of December, 1882.

Executed in duplicate.

The erasure made in section — before signing.

C. C. BURKE. [SEAL.]
THOS. FOLEY. [SEAL.]
M. McMAHON. [SEAL.]
VICKSBURG AND MEMPHIS RAILROAD COMPANY,
By JAMES M. EDWARDS, [SEAL.]
Vice-Pres'd't and Gen'l Manager.

For value received we hereby guarantee the faithful performance of the foregoing contract on the — party of the first part, and bind

ourselves to pay the party of the second part all damages it may suffer by reason of any default or failure on the part of the party of the first part in the performance of their obligation and undertaking the said contract to the amount of ten thousand (10,000) dollars.

JOHN JOHNSON.
WM. H. CARROLL.
CASEY YOUNG.
S. DREYFUS.

Copy.

("EXHIBIT D.")

The Financial Improvement Company to Burke, Foley, and McMahon, Dr.; address, Memphis.

DECEMBER 2, 1884.

No.		For—			
	General expenses:				
1.	Salaries of officers.....		Final estimate of work done under contract by themselves and others to Dec. 21st, 1883, and in full settlement of all demand growing out of same.		
2.	Stationary.....				
3.	Telegrams and postage..				
23					
4.	Advertising and printing.		338.982 c. y. earthwork at 20.		67.796.40
5.	Travelling expenses.....		4.006 "overhaul," 20.		801.20
6.	Legal expenses.....				
	Engineering:				
7.	Engineers and expenses.		250.88 acres clearing..	35.00	8780.80
8.	Instruments.....	77.37840	Less previous payment.....	53.902	132347627
9.	Horses, mules, wagons, etc.....				
10.	Tents.....		Am'ts paid others, 19.259.03		
	Rights of way and damages:		Am'ts paid this date.....	4217.24	23476.27
11.	Rights of way.....				
12.	Damages.....				
13.	Real estate.....				
	Roadway:				
14.	Graduation				
15.	Clearing and grubbing ..				
16.	Culverts.....				
17.	Cross-ties				
	Track:				
18.	Rails.....				
19.	Fish-plates.....				
20.	Nuts and bolts.....		Correct.		
21.	Spikes.....		—— ——, *Auditor.*		
22.	Frogs and switches.....				
23.	Track-laying.....		Approved.		
24.	Bridges and trestle..		—— ——, *Gen'l Manager.*		
25.	Yazoo bridge.....				
26.	Lumber and timber.....				
27.	Telegraph construction..		——, 188-.		
28.	Fencing....		Received of —— ——, treasurer of the Financial Improvement Company, —— dollars in full payment of above account.		
29.	Depots and platform....				
30.	Tanks and water stations.				
31.			—— ——.		
32.					

Defendant next introduced R. H. ELLIOTT, who testified as follows, to wit: I was engaged during the year 1883 by the New Orleans, Baton Rouge, Vicksburg and Memphis R. R. Co. as civil engineer on the construction of that company's line of road between Memphis and Vicksburg. Jno. A. Grant was chief engineer and had charge of the work between Vicksburg and New Orleans, while I had charge of that between Memphis and Vicksburg. J. M. Edwards was vice-president and general manager over entire road. Col. H. C. Derrick was my subordinate in charge of the division of fifty miles next south of Memphis, and I had sub-engineers, called resident engineers, on each section of eight miles. J. A. Moore was one of these resident engineers, and section 19 was a part of his residency. Derrick was not chief engineer; he was subordinate to me. The Memphis and Vicksburg Railroad Co. did not do any work of constructing this line of road; neither were Derrick, Moore, nor myself employed by nor agents of that company. This line was constructed by said N. O., B. R., V. & M. R. R. Co. and we were employed and agents alone of that Co. Neither myself nor any of my subordinates, Derrick, Moore, nor other-, had authority to let contracts for building any part of this road. No one had such authority except Mr. Edwards.

I never heard of the contract plaintiff claims and sues on until after this suit was brought. I never authorized Moore to make it. I had no power to authorize him, and he had no such right.

Section 19 was 5,500 feet long, and on the southern half was a trestle 1,600 feet length. This section was a part of the work let by the R. R. Co. to Burke, Foley, and McMahon. I saw plaintiff's force working on that part of section 19 south of this trestle, most of which was a sandy loam soil, light and easy to move. There
24 were only 15,000 cubic yards of earth to be moved (both excavation and embankment) on this section; that on the north of the trestle was much the heavier, because of being buckshot or gumbo soil and extra haul beyond 300 feet. I have had much experience in railroad building, and believe that it would cost twice as much to do the earthwork on that part of this section north of the trestle as to do that south of the trestle, all because of the difference in the soil, etc.

The contract sued on was never sent me by Derrick or other person-. I never heard of it until after this suit was begun. All estimates for work done under Derrick or Moore were submitted to me and approved by me before being paid and I never knew of such a contract, although I approved Owens' vouchers for such payments as were made him.

Defendant next introduced the deposition of H. C. Derrick, who — in words and figures as follows, to wit:

JNO. T. OWENS
vs.
M. AND V. R. R. Co. } Pending in Circuit Court of De Soto County.

We agree that this deposition may be taken before any officer authorized to administer oaths in the State where taken, without commission, waiving all formalities as to copies, time, etc., and that the same may be read as so taken.

WHITE AND MORGAN, *For Pl'ft.*
MALONE AND WATSON, *For Def't.*

In the Circuit Court of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to H. C. Derrick, Witness for Defendant.

1. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the construction *with* the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected? And, if you know, say who had charge of said work, particularly section 19; under what engineer, etc., etc.

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith file- as Exhibit "A" and say whether J. A. Moore or any other person had authority to make such a contract for the defendant.

5th. What officer- of defendant, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of plaintiff having done work on section 19; within what time, if any, was he to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now suing for or about his doing said work on said section? If so, relate all that he said, giving time and place, and in whose presence, and any letters from him about same.

8th. What monies, if any, and when, were paid the plaintiff on the work he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it an exhibit to your deposition.

9th. If you can, please exhibit a profile of said section at the time plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did, and what payments were made him thereon. Then also state what f[illegible] of men he had on the work when the same was taken from h[illegible]

whether the plaintiff was building said work as rapidly as required by def't; why taken from him; to whom left for completion; at what price, and how much was paid in all to such other party for so completing same; within what time such other party completed the work; how much was done by such other party, etc.

10th. What, if any, requirements do you know was made of the plaintiff as to completing the work on said section at any given time? State all you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Was any contract similar to that set out in said exhibit hereto ever made by you or any other person authorized by and for defendant to do so with plaintiff about said matter? Again, say what is meant by the endorsement, "Received by J. A. Moore, resident eng'r."

12th. Did the plaintiff have the men, implements, and animals needed for the completion of the said work and required by the engineer in charge, and did he obey all instructions given him by the engineer in charge?

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and the M. & V. R. R.

I, Jno. T. Owens, of the first part, do hereby agree to do all grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M. & V. R. R., of the second part, agree to pay 20 cents per yard for all excavations, and 20 cents per yard for all embankments, and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by engineer in charge, to be paid on the 12th of the following month, and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Received by J. A. Moore, resident engin'r.

Cross-questions by Pl'tf for Derrick.

1st. Was J. A. Moore ever in charge of section 19 as engineer; if so, for how long? Give dates.

2nd. Who had the contract for section 19 before it was let to plaintiff? State why the party or parties did not complete it.

3rd. When did such party leave or abandon the work on section 19, and why?

4th. Was not J. A. Moore authorized to contract with parties for work on the M. & V. R. R., and did he not make contracts with various parties for such work?

5th. Did you not authorize J. A. Moore to make contracts for work?

6th. When did you first learn that a contract had been made by Moore, the engineer, with plaintiff for work on said railroad on section 19?

7th. Did you not pay to plaintiff money on this contract on estimates made by J. A. Moore, your engineer; if so, on how many estimates did you pay him, and when?

8th. Did not Moore make other contracts with parties besides plaintiff for work on your railroad, and were not such contracts paid for, in whole or in part? If so, give the name of other parties with whom he contracted.

9th. If he made any such contracts in writing, annex copies of same.

10th. Did you order the contract made by Moore with plaintiff annulled; if so, for what reason?

11th. Did you not know at the time said contract was annulled and Donnelly and Co. put on section 19 that plaintiff had a sufficient force on the section to complete it as required by Moore, the engineer?

12th. Was plaintiff ever given notice of any intention to annul his contract before Donnelly and Co. were actually at work on section 19?

13th. Was plaintiff ever required to increase his force on the work by the engineer, and failed to do so immediately and in a reasonable time?

14th. Who contracted with Donnelly and Co. for the work on section 19 after plaintiff was at work there?

15th. Was J. A. Moore, the resident engineer, informed of any intention to annul the contract with plaintiff until Donnelly and Co. were actually at work on section 19; if so, who notified him?

16th. How long was it after placing of Donnelly on the work before the track was laid on it?

17th. Do you know what force plaintiff had on the work when his contract was annulled?

26 WHITE AND MORGAN, *For Pl'tf.*

Halifax C. H., Va., Sept. 11th, 1884.

Answers to Interrogatories.

1st. H. C. Derrick; a civil engineer, residing at Halifax C. H., Virginia.

2nd. I was the division engineer in charge of construction of the M. & V. R. R. from Memphis, fifty miles south, and continued so in charge from October, 1882, to Dec. 31st, 1883. The resident engineer on section 19 was J. A. Moore, acting under my authority.

3rd. The only person authorized to make written contracts for

the graduation of the work on the part of the R. R. Co. was James M. Edwards, V. P. and gen'l manager.

4th. Mr. J. A. Moore was not authorized to make such a contract on the part of the defendant.

5th. Mr. J. M. Edwards was alone authorized to make such a contract.

6th. Mr. Jno. T. Owens did some work on section 19 by agreement with Mr. Moore, and was paid for the same by me on the estimate given by Mr. Moore; sometimes from money furnished by Burke, Foley and McMahon, and sometimes from funds advanced by me and charged to the contractors, Burke, Foley and McMahon, as were also the amounts paid to other parties doing similar work on section 19 and on other sections comprised in the original contract of Burke, Foley and McMahon. The amounts so paid, the cost of the completion of unfinished work on section 19, and the dates thereof being matters of record, and the record having passed from my possession long since, I cannot state them. Mr. Owens had no contract to be declared forfeited, being simply allowed to do the work at a certain price, and being promised to be permitted to do all on section 19 if he would do it in time to prevent any delay in the tracklaying. He was allowed to do all that he could, and, not progressing fast enough, other forces were put on to complete it in time. The railroad company recognize no subcontractors at all, but under their contract exercised the right to put on hands when the work was not progressing satisfactorily, pay them as per agreement, and charge the amounts so paid to the contractors for the work in question. Messrs. Burke, Foley and McMahon sometimes furnished me the money to pay these men, and sometimes I advanced and charged it to the account of said Burke, Foley and McMahon.

7th. I have had none.

8th. I paid money to Owens for work done by him on section 19, but cannot state amounts and dates. Receipts were taken for same, and amounts charged against Burke, Foley and McMahon, said receipts being returned to them (Burke, Foley and McMahon) upon final settlement.

9th. I cannot furnish profile nor give detailed statement asked for, but I can say that he (Owens) was not building the work as fast as required, and that it would have been impossible for him to have done so with his force, as evidenced by the very heavy force put on by the company, which only succeeded in getting it done at the very last moment by the untiring exertion of the engineer, sent especially for that purpose, and at a very much greater cost than Owens was getting for it. The work was not completed by contract, but by Donnelly and Co.'s forces, who were paid the actual cost of labor and teams, with ten per cent. added for tools, etc. I will add that the work was not taken away from Owens, but that he was allowed to go on and did actually go on working, and was allowed to do all he could, and had the very best part of the work, that done by the company being in Norfolk Bayou swamp and very expensive, whilst that done by Owens was high and dry and easily and cheaply done.

The force put on by the company only assisted him in the completion of the section, and when he had done his easy part I think he did more work on sections 22 and 23 in the same way.

10th. Mr. Moore was directed by me to put any one to work on section 19 who could do the work in time, with the promise that he would see that they received their pay from the contractor. He wrote me that he had found a man (who afterwards turned out to be Mr. Owens) who would undertake it. I directed him to be put to work immediately if he was satisfied that he would comply with our wishes as regarded time, and that I would see that he received his pay for work done. Mr. Moore notified me that he had
27 done so, but I never saw the alleged contract now sued on, nor did I ever hear of it until the completion of the section.

11th. I have no knowledge of any such contract with others, and cannot explain Mr. Moore's endorsement, except it be merely the date at which the proposed contract or memorandum of agreement was filed at his office.

12th. Mr. Owens did not have the men or the means to complete this work in time, and was repeatedly directed by the resident engineer, acting under my orders, to put a larger force on the section and to push the work, all of which he failed to do in a satisfactory manner.

Answers to Cross-interrogatories.

1st. J. A. Moore was in charge of section 19, as resident engineer, from about January or February, 1884, to October, 1884.

2nd. The contractors for section 19 were Burke, Foley and McMahon. I suppose they did not complete it because they had more work than they could do.

3rd. I don't think they ever did any work on it, except a few yards by a subcontractor named Conway.

4th. No; Mr. Moore was not authorized to make contracts for work. Where contractors failed to push their work it was feared the track would catch them. He was directed to put men on the work for the contractor under a promise that we would see that they were paid, which was always done, and the amounts so paid charged to the contractor against his estimates. The work was always estimated to the original contractor at his contract price and sent in to the company in his name, no matter who had done it.

5th. I directed Mr. Moore as above.

6th. I never heard any contract claimed different from the above, as having been made by Owens, until the work was about completed. I do not remember the dates.

7th. I paid money to Owens for work done on section 19 on estimates made by J. A. Moore, but it was on account of Burke, Foley and McMahon, and was charged to them. Mr. Owens must be well aware of this fact, as he was several times put off in the payments of his estimates, because the money for the payment of Burke, Foley and McMahon had not come, and he was informed at the time. I think the number of payments was two, or, probably, three.

8th. Mr. Moore employed other parties to do work, who were paid

in similar manner, and amounts charged to Burke, Foley and McMahon. I cannot give the names of said parties, and never heard of any contract claimed by any one of them.

9th. I never saw or heard of any.

10th. Mr. Owens not putting on sufficient force to do the work required, it was ordered by J. M. Edwards, V. P. & G. M., that Donnelly's force be put on to complete the work. I directed this to be done, but we had no contract, only a verbal agreement. Mr. Owens was at liberty to continue work also with all the force he had, and did actually so continue.

11th. Mr. Owens never had a sufficient force on to complete the work in thrice the time left for its completion, and did not make any show to do better.

12th. Mr. Owens was repeatedly notified that his force was inadequate; that if he did not put on a sufficient force the company would do so. We never regarded Mr. Owens as having any contract.

13th. Mr. Owens was repeatedly notified to put on more men, or that the company would do so. His failure to comply with these orders necessitated the employment of others.

14th. J. M. Edwards directed Donnelly's force to be put on section 19 in order to finish it in time.

15th. Mr. Moore was from the beginning informed and knew that the prime object was to complete section 19 and all other work in time to prevent any delay in track-laying, and that men were to be put on for that purpose and in sufficient numbers, and, if those already there did not give reasonable hope of being able to do so, that he was to employ more. Mr. Owens was allowed to do all the work he could do, and even Donnelly's very large force and ample outfit, in addition, only completed it at the last moment. Mr. Moore received his instructions from me.

28 16th. I do not remember; I think about six or seven weeks.

17th. I knew at the time, as I had a weekly report from every section of the numbers employed, but I do not remember. I know, however, that it was absurdly inadequate to the end in view and time left, and even if Owens had been able to push the work through that it would have cost him at least 50 per cent. more than the prices agreed upon.

H. C. DERRICK.

The foregoing deposition was taken, subscribed, and sworn to before me by H. C. Derrick, the deponent, for the purpose mentioned in the caption, this 11*yh* day of September, 1884.

WM. A. ROGERS, *N. P.*

STATE OF VIRGINIA, *Halifax County*, } *To wit:*

I, E. H. Vaughn, clerk of the county court of Halifax county, in the State of Virginia, certify that Wm. H. Rogers, whose name is signed to the foregoing deposition as having been taken before him,

is now and was at the time of signing the same a notary public in and for said county, duly commissioned and qualified; that his signature there- is genuine and entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the court-house, this 11th day of September, 1884.

E. H. VAUGHN, *Cl'k.*

Filed July 6th, 1885.
T. R. MAXWELL, *Cl'k.*

Commission to Take Deposition, Hernando, Miss.

State of Mississippi to Jno. C. Ferris, judge of the county court, Davidson county, Tennessee, Greeting:

Know ye that we, reposing especial confidence in your fidelity and circumspection in diligently examining James Eagan, witness in a suit now pending in our circuit court of De Soto county, wherein Jno. T. Owens — plaintiff and Memphis and Vicksburg R. R. Co. defendant, do empower you, at such time and place as you shall appoint, to call and cause to come before you the witness aforesaid and him diligently to examine on oath touching the premises to the interrogatories and cross-interrogatories hereto attached, and his examination, when made, you shall send into our said court without delay, under your hand and seal, returning also the writ.

Witness my hand and the seal of said court, at my office, in Hernando, the 4th day of August, A. D. 1885.

T. R. MAXWELL, *Clerk.*

The deposition to be sealed up, with the suit endorsed on the back of the envelop, and directed to the "clerk of the circuit court of De Soto county, Mississippi," at Hernando.

And then defendant introduced and read to the jury the deposition of James Eagan and exhibits thereto in words and figures as follows, to wit:

In the Circuit Court of De Soto County, State of Mississippi.

JOHN T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

Interrogatories to be propounded to JAMES EAGAN, a witness for defendant, who resides in Nashville, Tenn., viz:

1st. What is your name, your age, your residence, and your business?

2nd. Are you acquainted with the line of road that was built through De Soto county, Miss., in the year 1883, known as the Memphis and Vicksburg R. R., now as the Louisville, New Orleans and Texas railway? If so, state how you know said railroad;

whether you built any part of said road; and, if so, when and what part.

3rd. Are you acquainted with the plaintiff, Jno. T. Owens? If so, say whether you know anything of any work done by him or his employees in the building of said railroad during 1883,
29 where he worked, and all you know about it.

4th. Do you know where section 19 on said line of road as its sections were numbered during construction lay? If so, please describe the line of road on said section; whether earthwork or trestle, cut or fill excavation or embankment, etc.; and, if you know, say who built the line of road on said section 19. If built by more than one person, state the quantity and character of work done by each respectively, and if you can give a profile of the line on said section, please do so.

5th. Please describe as particularly as you can the character of the earthwork done and needed to be done on the south end, say for 1,500 feet length of said section 19; what part of said 1,500 feet length was excavated and what part was embankment; whether the earth moved from the excavation could be or was put into embankment or not; how much earth would have to be or was taken from barrow pits to put into embankment, the length of haul, the character of the soil, etc., and what it would cost during July, August, and September, 1883, to do that work; also say who did that work.

6th. Beginning at a point on said section 19, about 1,500 feet north of the south end thereof, is there not a trestle for about 1,600 feet length from there north? If so, state the length and height of said trestle and who built it and when.

7th. Beginning at a point on said section 19, about 3,100 feet north of the south end of said section, describe the earthwork from there to the north end of said section; say whether or not you did not build the same; if so, say when you began the work and when you finished it; what force of men, teams, and tools you had at work on it, the quantity of earth moved, whether excavation or embankment, and what quantity was taken from barrow pits, if any; what length of haul. State also what said work cost in August and September, 1883, or what it could be done for, and how you know the same.

8th. Did you about August, 1883, see plaintiff at work on any part of said section? If so, say with what force of men, teams, and tools; also say how long or within what time plaintiff — that force could have completed the northern 2,400 feet of said section.

9th. If there was, from the nature of the work to be done, character of soil, length of haul, or otherwise, any difference in the cost of doing said *said* work south of said trestle from that north of said trestle, please state fully what such difference was, the reason thereof, how you know it, etc.

10th. When was the work on said section finished? If different parts were finished at different times, give each as near as you can. Do you know when the track, I mean the rails and ties, were laid

on said section? If so, say when; whether the track-laying reached said section at or before the completion of the earthwork or no.

11th. Did plaintiff do any work on said line of railroad after said work on said section 19 was finished? If so, say when and where, and, if you know, say with what force of men, teams, and tools. Did not the plaintiff during August, 1883, move his entire force from the south end of 19 onto section- 22 and 23, some three miles — of 19, and work there some time thereafter?

WATSON AND CUMMINS, *Att'ys.*

Filed July 20, 1885.
T. R. MAXWELL, *Clerk.*

Cross-interrogatories for James Eagan by Plaintiff.

JNO. T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

1st If in answer to 8th direct question you give a time within which the work north of the trestle on section 19 could have been done, state also whether you know Owens could not have obtained a force sufficient to do the *the* work in a much shorter time if he had been required by the engineer to get a larger force.

2nd. If you did the work as soon as it was needed, state how you know that Owens could not have procured a sufficient force to do it as soon as you did.

3rd. Did not Donnelly and Co., of which you were a member, have a contract to do the work on sec. 19 for the railroad Co. at 20 cents per cubic yard? If so, annex herewith said contract or a copy of the same; give its date.

4th. Why did Donnelly and Co. not do the work under that contract?

5th. What did the work cost done under the new contract made when the work on section 19 was taken from Owens? Annex a copy of the contract under which you did the work.

6th. Did not this change of contract injure Burke, Foley and Company and put money in the pocket of Donnelly and Co., and why was this done?

7th. Are you a civil engineer; and, if so, where were you taught?

8th. Have you settled with the railroad company for your contracts with them for work on their line? If so, when did you settle?

9th. Have you any contracts with the L., N. O. and Texas R. R. Co.? If so, on what part of its line?

10th. State anything you may know to benefit of plaintiff.

Filed July 20th, 1885.
T. R. MAXWELL.

31 STATE OF TENNESSEE, }
County of Davidson. }

Be it remembered that on this — day of August, A. D. 1885, by virtue and — pursuance of a commission to *be* directed from the circuit court of De Soto county, Miss., to take the deposition of James Eagan, of the city of Nashville and the State of Tennessee aforesaid, a witness for defendant in a certain suit in said court pending wherein John T. Owens is plaintiff and The Memphis and Vicksburg R. R. Co. is defendant, on the interrogatories and cross-interrogatories attached hereto and accompanying said commission, I caused the said JAMES EAGAN, a person of sound mind and of about forty years of age, to come before me at my office, in Nashville, State of Tenn.; and said Eagan, being by me first duly cautioned and sworn to speak the truth and nothing but the truth in answer to said interrogatories and cross-interrogatories, did depose and say as follows:

1st. My name is James Eagan. I am 44 years of age; reside in Nashville, Tenn., and my business that of railroad contractor and builder.

2nd. Yes; I know a part of said road, that part of it next to Memphis, say for twenty-five miles south of Memphis. The firm of Donnelly and Co., of which I was a member, built the first eight miles from Memphis south, a portion of section 19 and 23, in De Soto county, Mississippi, and then about ten miles south of Clarksdale. I was not on this last ten miles south of Clarksdale, but had personal supervision and control of the other, including all of section 19, north of the trestle over the bayou. I was on this work and built the railroad bed, embankment, and cut them with the men and teams employed by Donnelly and Co.

3rd. Yes; I know the plaintiff; met him first on said railroad when he was at work on the south end of section 19, the part south of the trestle over the bayou. I first met him then about the 10th of August, 1883. He had been at work on that part of section 19, south of the trestle, and continued there during August, 1883.

32 About the 10th of August, 1883, I moved my forces on to the part of section 19 north of the trestle, and he finished his work on the south end about the same time that I finished mine on the north end, say about the 10th of September, 1883, and we moved our camps and equipments pretty much together to section 22 and 23, south of there.

4th. Yes, I know said road and its sections as numbered during its construction. I know where section 19 was, having spent near a month on its building, the greater part of it; I mean of the earthwork on it. Commencing at the north end of that section, there is a short cut, then a long and high fill or embankment, this part I built; then there comes a trestle about 1,000 feet long, built by J. C. Neely and Co., and at its south end is a short fill or embankment about 500 feet long, and next south of that is a deep cut (say 10 feet, which is deep for the country) of about 500 feet, then shading down to allow cut of 2 or 3 feet out of south end of section.

This work at this south end was done by plaintiff. The cut at the north end is only about 4 feet deep at deepest point, and is less than 150 feet long, will not average 2 feet that distance, and then comes the embankment of about 1,350 feet, over ten feet high most of its length. The earth for this long embankment had to be borrowed and hauled about 1,000 feet, being built through a heavy buckshot soil, forcing us to haul from dryer part next the high ground at north end. The earth for the fill south of the trestle built by the plaintiff was mostly taken from the cut just south of it, when the soil was light, being a sandy loam. There instead of wasting the dirt taken from the cut, it was hauled and put in the fill, so that the builder got double pay for moving the dirt over for excavating the cut and again for putting in embankment, while on my end we had no dirt to amount to anything from the cut, and so had to borrow nine-tenths of that needed for our bank, and because of the swamp had to haul an unusual long distance. I append hereto as Exhibit A profile of said section showing this work and how it lay.

5th. Commencing where the trestle ends, there is about 400 or 500 feet length of enbankment, and from there running south, then next comes about 500 feet of deep cut, and from there to south end of section small cut not amounting to anything.

33 The entire earth taken from the deep cut could be and was mostly put into the embankment next the trestle. I think there was about 2,600 yards of this excavation or cut, all a light dry earth, what is called a sandy loam, and there is about 4,400 yards of the embankment, and estimating the 2,600 yards of excavation as put in the embankment, and I think it all went there, would leave only 1,800 yards to be borrowed, and this could be mostly borrowed from the sides of the cut, all light and dry. So far as I saw, this work was done by the plaintiff, though, perhaps, Burke, Foley and McMahon did some of it before we went there. I am satisfied that this work on the south end of the trestle could — been done at that time at about 15 cents a cubic yard. I mean that I could have done it for that with my equipment.

6th. Yes; there is such a trestle there about 1,600 feet long and about 12 or 15 feet high. It was built by J. C. Neely and Co., successors to McCalen, Gates and Co. They built it during summer — 1883, finishing it just as I left there.

7th. This north end of said section, about 1,500 feet length, is almost entirely embankment, as shown on the profile herewith exhibited. There is a short and shallow cut at the north end of the section, not averaging 2 feet depth for 150 feet, and then from there to the trestle is about 1,350 feet long by 10 feet high enbankment. I built all this, our forces being employed by the R. R. Co. therefore. I began work then about August the 10th and finished about 10th September, 1883, having about 75 men and about 200 *whell* scrapers and about 12 long scrapes, each drawn by two mules and driven by a man, these drivers being extra of the 75 men mentioned, and two double and one single plow team. The quantity of earth moved by me was about 12,000 cubic yards, almost entirely enbaukment and

more than nine-tenths borrowed. By the word borrowed I mean taken from outside the road-bed and hauled onto and put into the road-bed. The average of the haul of earth for this bank was more than 1,000 feet, the south end of this bank requiring more than the north end, being higher and wider. He would not take this work from Col. Derrick at less than forty cents per cubic yard, and he was not willing to pay us that price, and we then agreed to do it
34 for him at cost and ten per cent. added for our attention, use of tools, and etc.—that is, he paid us what we paid our laborers, hired our teams at $4.00 per day, and when done paid us that and ten per cent. more for our attention, use of tools, and etc. I do not remember exactly what it amounted to on this section. He kept a man there to keep the time worked by every man, team, etc., and I think it must have cost about 32 and a half cents a cubic yard. I was on the work all the time and did it as cheaply as it could have been done. I have been doing such work for the past 20 years and have just taken a contract with the city of Nashville for earthwork costing $55,000.00 under a large number of bidders.

8th. Yes; I saw him there several times that month. He had about 14 men with shovels and barrows; some of them were weakly fellows, such as required two men to roll a barrel. They were mostly "convicts." I don't think he could have done the 1,500 feet length of section 19 north of the trestle, which, as I have said, I built with that force inside of a year. He could not have done it with that force. It was necessary to employ teams and buggy scrapers to make that long haul.

9th. I have pretty much answered this above. The difference of the earthwork north of the trestle and that south of it lay in this: Most of the embankment on the south was built of earth that had to be moved out of the adjacent cut, so that earth moved to make excavation also went into embankment, and what was needed further to finish the embankment could almost entirely be taken from the side of the cut of a dry soil in a short haul, while on the south end there was almost no excavation—comparatively speaking, none—and the earth for the long and high fill had to be borrowed from the dryer portions of the swamp and hauled more than double as far as the farthest haul on the south end. This extra haul cost double. I know this because work of this kind is my daily business and has been for 20 years, and have done similar work a hundred times in many different places.

10th. It was all finished about the 10th of September, 1883, and the track rails were laid over this section immediately thereafter. The track-layers were almost on us before we finished our work, and it was the pressure to get this earthwork done ready for
35 the track that induced our employment there. We barely got it done in time, then moved some three or four miles further south, the plaintiff also moving his force off the south end of section 19 at same time to other work on sections 22 and 23.

11th. Yes; *or* I stated above, he moved south about with me, and continued some forces at work south of 19.

Answers to Cross-questions.

1st. I do not know what force plaintiff could have obtained nor in what time. I do — know what he was able to do in that respect. I only mean to say that with the equipment he had on section 19 during August and September, 1883, he could not have done the earthwork on north of the trestle inside of a year.

2nd. I know it, because with my larger and more effective force and equipment I could do it far quicker than was possible with his smaller and weaker force and want of proper equipment. As stated above, if plaintiff had had sufficient force and proper equipment he might have done it as quick as I did. I suppose the difference lay in my having what he did not have.

3rd. We did have such a contract, but I have it not and am unable to give a copy of it. Defendant, I think, has it. I think it is dated in fall of 1883, and embraced, I think, 50 miles of road, commencing at Memphis and running south, including said section 19. We could have done it at a profit, because while this part at north end of section 19 and several other like plans would have cost us more than 20 cents per cubic yard, yet so much of the 50 miles would have cost less than that, that on the whole we could have a profit. It is free for a contractor to get the cream as plaintiff did, and have the company take the load off his hands as when getting *by* firm to the hard part.

4th. As we cancelled that contract before any work was done on it, and my firm made a new contract at the same prices for the eight miles next to Memphis, and R. R. Co. let the 50 miles next south of that to Burke, Foley and McMahon at, I think, the same
36 price *same price.*

5th. Such as we did under the new contract, mentioned in last answer above, we got 20 cents for according to that contract. The work we did on section 19 north of the trestle we did not do under any written contract. Col. Derrick employed us, paying us actual cost that we were out for labor, hiring our two mule-team scrapers and drivers at $4.00 per day, and paying us ten per cent. profit for our attention and etc.

6th. Yes; I suppose Burke, Foley and McMahon lost money by this, because full contracts were paid plaintiff for doing the easy part, on which there was a handsome profit, while the harder and more costly part was done by my firm at actual cost. In that way Burke, Foley and McMahon lost the profits which the plaintiff made. I suppose it was done under the us-al clause in all contracts as to railroad work, empowering the company's engineers, in case the contractor fails to press forward the work with reasonable dispatch, to put a force at it and complete it at contractor's cost. I think such a clause is in all the contracts I ever saw.

7th. No; I am not.

8th. We have settled for some of our work. Other items are unsettled, and a suit is pending at Memphis to settle the issue between us.

9th. No; none.

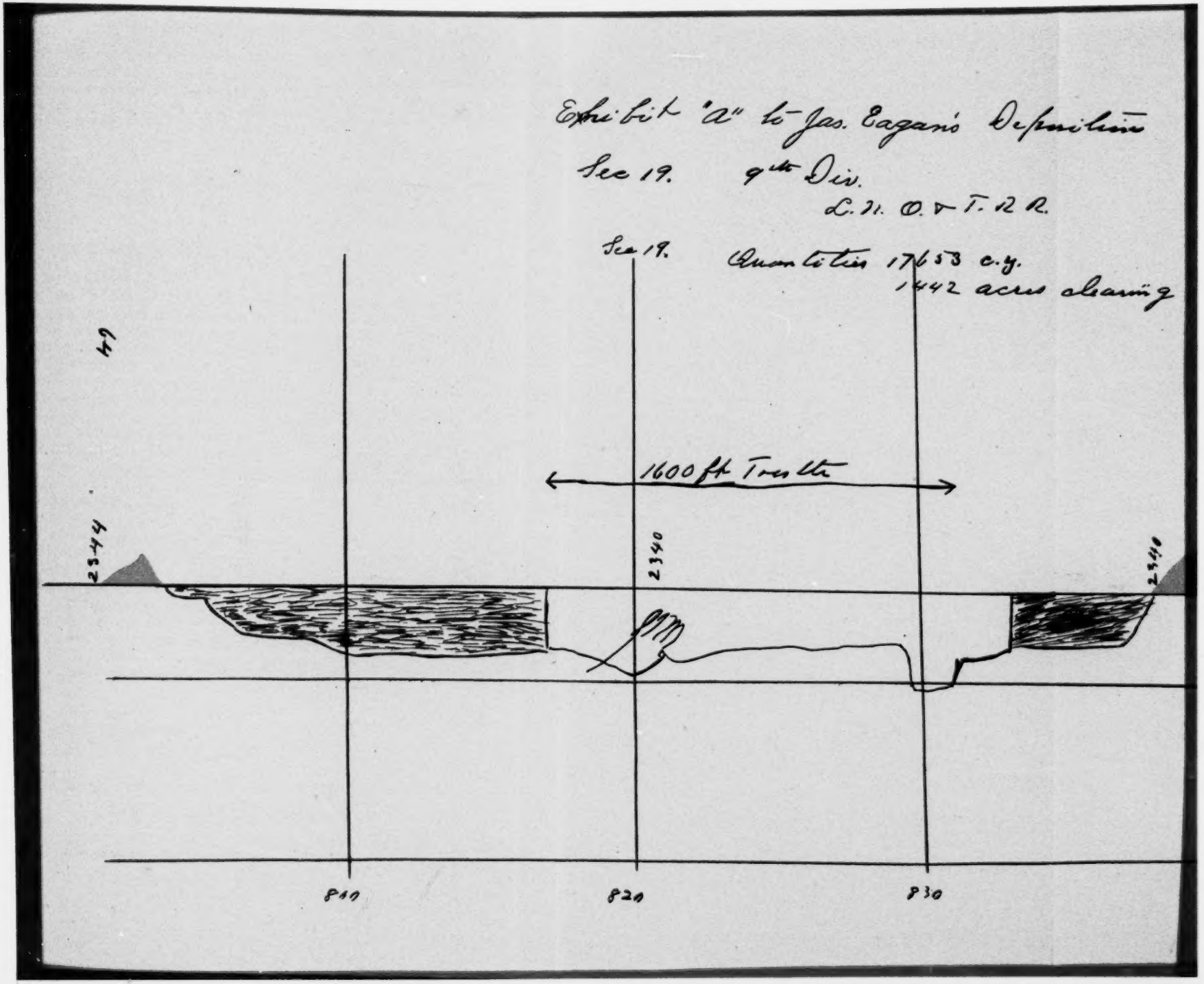
Exhibit "A" to Jas. Eagan's Deposition
Sec 19. 9th Div.
L. N. O. & T. R R.
Sec 19. Quantities 17653 c.y.
1442 acres clearing
49
1600 ft Tracks
2344
2340
2340
810
820
830

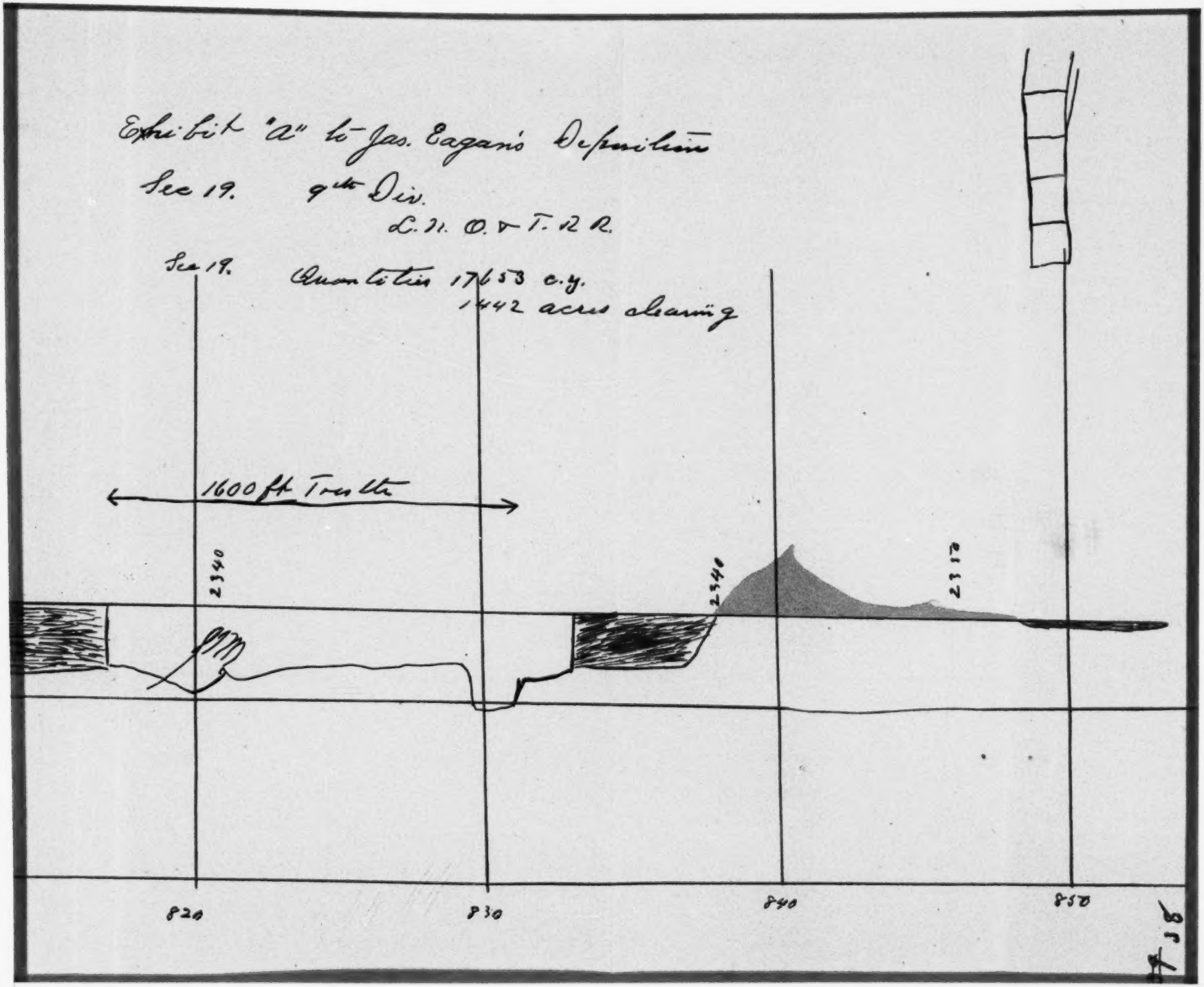
Exhibit "A" to Jas. Eagan's Deposition
Sec 19. 9th Div.
L. N. O. & T. R R.
Sec 19.
Quantities 17653 c.y.
1442 acres clearing
1600 ft Trestle
2340
2340
2312
820
830
840
850

10th. I know nothing to his benefit, except that the R. R. Co. did him a great favor when it employed us to do that work on the north end of section 19, on which he claims a contract to do it at 20 cents, for that saved him from one to two thousand dollars, which he would have lost in doing under his contract.

JAMES EAGAN.

Sworn to and subscribed before me August the 20th, 1885.

J. R. McCANN,
Dep'ty Cleark Co. Court.

37 STATE OF TENNESSEE, }
County of Davidson. }

I, John C. Ferris, specially appointed a commissioner in the cause styled in the caption of the foregoing deposition to the deposition of James Eagan, a witness for the defendant in said cause, do hereby certify that I caused said James Eagan to come before me at Nashville, in the said State, and he, *by* being by me duly cautioned, sworn, and examined to speak the truth, the whole truth, and nothing but the truth in answer to said interrogatories and cross-interrogatories, did give the foregoing deposition; that the answer of said Eagan were reduced to writing by me in the presence of said witness and were carefully read to and thoroughly understood by said witness as his deposition in said cause; that he signed the same *on* his deposition in my presence; that the questions propounded to said witness and to which he has answered are the direct and cross interrogatories accompanying said commission; that said deposition has in no manner been changed *are* altered since the same was subscribed by said witness, but the same has remained in my possession up to the time of sealing and delivering the same to the post-office, directed to the cleark of said court; and I do further certify that I am the person named in said commission, am the judge of the county court of said county of Davidson, and by the laws of Tenn. am authorized to administer oath.

In witness whereof I have hereto set my hand and affixed my seal this 20th day of August, 1885.

JOHN C. FERRIS,
County Judge.

Filed August 22nd, 1885.

T. R. MAXWELL, *Cleark.*

(After this comes plat marked p. 38.)

39 Defendant then read to the jury the deposition of ARTHUR DONNELLY in words and figures as follows, to wit:

In the Circuit Court of De Soto County, Miss.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to Donnelly, Witness for Defendant.

1st. What is your name, age, residence, and business?

2nd. What connection have you had, if any, with the construction of the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected, and, if you know, say who had charge of said work, particularly section 19—under what engineer, etc., etc., etc.?

3rd. State what authority said engineers had to make contracts for constructing said road.

4th. Examine the paper herewith filed as Exhibit "A" and say whether said J. A. Moore or any other person had authority to make such a contract for defendant.

5th. What officers of defendants, if any, were authorized to make such a contract or other contracts for construction?

6th. State all you know of the plaintiff having done work on said section 19; within what time, if any, he was to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7th. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now sueing for, or about his doing said work on said section? If so, relate all that he said, giving time and place and in whose presence, & any letters from him about same.

40 8th. What monies, if any, and when, were paid the plaintiff on the work that he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it and exhibit to your deposition.

9th. If you can, please exhibit profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what work he did and what payments were made him therefor; then also state what force of men he had on the work when same was taken from him, whether plaintiff was doing said work as rapidly as required by defendant, why taken from him, to whom let for completion, at what price, and how much was paid in all to such other party for so completing same, within what time such other party completed the work, and how much was done by such other party, etc.

10th. What, if any, requirement do you know was made of the plaintiff as to completing the work on said section by any given time? State all that you know on that subject, and also say

whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11th. Who completed the work left unfinished by Owens on section 19?

12th. What did it cost to complete said work? Give detailed statement of cost of clearing, also cost per yard for excavation, and also for embankments.

13th. Give the character of work required to be done on section 19, what part of the work Owens did, and how the work done by him compared with the work which remained to be done. Which cost the most, that done by him or that he neglected to do?

14th. How much would the profits to a contractor have been on that part of section 19 which Owens did not complete, under a contract identical with a copy of what purports to be a contract between Jno. T. Owens and the Memphis and Vicksburg R. R. Co., by J. A. Moore, engineer, filed as Exhibit "A" hereto, supposing the work to have been done by the party having contract as economically and with as little cost to the contractor as possible?

41 15th. Who had the contract with the Memphis and Vicksburg R. R. Co. to do the work on section 19 of said road? File a copy of said contract as Exhibit "B" to your deposition, if in your possession.

16th. How was it that the party having said contract failed to do the work thereon?

17th. How and by whom was the money paid for the completion of said work on section 19?

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreement between Jno. T. Owens and the Memphis and Vicksburg R. R. Co.

I Jno. T. Owens of the first part do hereby agree to do all grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M. & V. R. R. of the second part agree to pay 20 cents per yard for all excavations and 20 cents per yard for all embankments and to pay $35.00 per acree for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by the engineer in charge to be paid on the 12th of the following month and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Rec'd by J. A. Moore, resident eng'r.
6—244

We waive formality and agree for this deposition to be taken without commission before any officer empowered to take depositions.

WHITE AND MORGAN, *For Pl'f.*

Answer by Arthur Donnelly to Questions Propounded by Defendant.

Ans. 1st. My name is Arthur Donnelly. I am twenty-three years old. I live in Memphis, Tenn., U. S. A. I have been engaged in railroad construction.

Ans. 2nd. I have been engaged on the Memphis and Vicksburg railroad since the 1st of January, 1883. I was then connected
42 with Donnelly and Co., railroad contractors, from the date above mentioned until the present time or at least until I left Memphis, Tenn., which was on the 1st of July (1885), eighteen hundred and eighty-five. J. M. Edwards, vice-president and gen'l manager, had charge of the entire line of railroad between Memphis and New Orleans. Col. Derrick was his assistant for the first fifty miles south of Memphis. He was Mr. Edwards' assistant for that part of the road and was in direct charge, subject to Major Edwards' instruction. This fifty miles included section 19.

Ans. 3rd. I believe Col. Derrick and Major Edwards were the only men who could make a contract for the construction of said railroad, because they were the only men Donnelly and Co. made contracts with for the construction of their part of the railroad.

Ans. 4th. I do not know that J. A. Moore had any authority to make a contract for the railroad company such as the within Exhibit "A." I only knew that Major Edwards had that authority or Col. Derrick by his instruction.

Ans. 5th. Major Edwards was the only man that I was aware of who had authority to sign contracts for the railroad company for the construction of their road.

Ans. 6th. All that I know of plaintiff is that I saw him at work on section 19 in the month of August, 1883. I do not — what time he was required to complete his work in, or what his contract with the railroad Co. was, or whether any or not. The costs of what the defendants did on the remaining portion of section 19, I should say, must have cost about 40 cts. per cubic yard.

Ans. 7th. I do not remember having any conversation with Mr. Owens in regard to the claim he has made or is suing for.

Ans. 8th. I do not know of any monies being paid Mr. Owens or any receipts being taken.

Ans. 9th. I cannot exhibit a profile of section 19 when
43 Mr. Owens began work thereon, for I did not see it at that time, and I do not know how much work he did or how much money was paid him for said work. When I saw him, which was about the 21st of August, 1883, he had about 20 men on the section 19 and I was over the work several times after that and I never saw more men on the work. I do not think that Mr. Owens was building at as rapid a speed as required by the rail-

road company. I suppose it was taken from him because he was not pushing the work rapidly enough. It was not let to any one for completion. The railroad company put a hired force on the work and finished it themselves. The railroad company's force completed the work in about four weeks after they took hold of it. I do not know the exact amount done by the railroads company's force.

Ans. 10th. I do not know what requirements was made of Mr. Owens or what requirements he was obligated to.

Ans. 11th. Donnelly and Co.'s forces completed section 19.

Ans. 12th. I cannot give detailed statement of the cost of completing section 19, but I give as near as I can remember. The cost per cubic yard, according to my calculations and Mr. James Eagan's, who was also on the ground and superintending the work, was about 40 cts. per cubic yard for embankment, and I should say about 25 cts. for excavation, about $70.00 per acre for clearing.

Ans. 13th. The character of the work required to be done on section 19 was embankment principally, when the forces of Donnelly and Co. was put on it, and *and* was situated so that it was very difficult for to get the dirt, being most part in soft, swampy place- and amongst heavy timbers, which neces-itated an extra force to be *keep* on in order to clear for the getting of the dirt. The work done by Owens was of a soft, sandy nature and was dry and without heavy timbers, consequently it could be done for, I should say, one-third the price of that done by the railroad company's forces.

Ans. 14th. The profits of a contractor on that portion of section 19 not done by Owens under contract, such as Exhibit "A," I should say would be a "loss."

44 Ans. 15th. I understood Burke, Foley and McMahon had a contract for section 19, but I have no personal knowledge of it or no copy of a contract.

Ans. 16th. I do not know.

Ans. 17th. The money was paid Donnelly and Co. according to the pay-roll kept by the railroad company's timekeeper, named Mr. Divine, for the completion of section 19 after Mr. Owens quit or was suspended.

Ans. to Interrogatories by Plaintiff.

Ans. 1st. I am in no person's employ at present; I have never been in the employ of the defendant.

Ans. 2nd. The way I know Col. Derrick h-d authority to sign contracts I have seen him do so, and the same was reco-nized by Major Edwards as being all right.

Ans. 3rd. I do not know what authority was given J. A. Moore.

Ans. 4th. I do not know whether Mr. Owens went to work under the contract as Exhibit "A" or not.

Ans. 5th. I think J. A. Moore was resident engineer on section 19 at the time of this contract as Exhibit "A" was made, and perhaps continued for about two or three weeks after. Said J. A.

Moore, I believe, is now at Knoxville, Tenn., and, I think, has been there since September, 1883.

Ans. 6th. I do not know of any estimates being made for or given Mr. Owens by the resident engineer or being paid for by the company's agents.

Ans. 7th. I do not remember any conversation regarding the work between Mr. Owens and myself.

Ans. 8th. I cannot state that I know of any claim being made on Mr. Owens by any one.

45 Ans. 9th. I do not know that it was taken from him without notice.

Ans. 10th. I do not know that J. A. Moore ever stated that Owens was a good, reliable contractor or was getting along well. I did not consider him reliable or getting along well.

Ans. 11th. I do not -no- of any demand or requirement being made.

Ans. 12th. I state the character of work done by Owens because I saw it; I do not know how J. A. Moore characterized that portion of the work done by Owens, for I never asked him about it.

Ans. 13th. I do not know whether Owens neglected or refused to comply with the engineer's instructions or not.

Ans. 14th. My opinion in answer to the 14 direct interrogatory is founded upon practical experience.

Ans. 15th. I do not know what Owens' labor cost him.

Ans. 16th. I could not tell exactly how long it was from the time the work was taken from Owens until the steel was laid down.

ARTHUR DONNELLY.

UNITED STATES CONSULATE AT BELFAST, IRELAND.

The foregoing answers to interrogatories and cross-interrogatories were subscribed and sworn before me, Arthur B. Wood, United States consul at Belfast, Ireland, by Arthur Donnelly on this 30th day of July, 1885.

In witness whereof I have hereunto set my hand and the seal of the consulate the day and year just above written.

ARTHUR B. WOOD,
United States Consul at Belfast, Ireland.

Filed September 21st, 1885.

T. R. MAXWELL, *Cleark.*

46 Defendant then introduced the deposition of THOMAS FOLEY and exhibits thereto in words and figures as follows, to wit:

In the Circuit Court of De Soto County, Mississippi.

JNO. T. OWENS
vs.
M. & V. R. R. Co.

Interrogatories to be Propounded to Foley, Witness for Defendant.

1. What is your name, age, residence, and business?

2. What connection have you had, if any, with the construction of the line of railroad from Memphis to Vicksburg, and for what time were you so therewith connected, and, if you know, say who had charge of said work, particularly section 19—under what engineers and etc.?

3. State what authority said engineers had to make contracts for constructing said road.

4. Examine the paper herewith filed as Exhibit "A" and say whether said J. A. Moore or any other person had authority to make such a contract for the defendant.

5. What officers of defendant, if any, were authorized to make such a contract or other contracts for construction?

6. State all you know of plaintiff having done work on said section 19; within what time, if any, he was to complete such work; what the completion of that he left unfinished cost the defendant; whether his contract was declared forfeited or not, and for what cause it was so done.

7. Have you had any conversation or correspondence with the plaintiff about the claim he has made and is now sueing for, *are* about his doing said work on said section? If so, relate all that he said, giving time and place, and in whose presence, and any letters from him about same.

47 8. What monies, if any, and when, were paid the plaintiff on the work he did on said section, and was any receipt taken therefor? And, if so, please attach the same hereto and make it an exhibit to your deposition.

9. If you can, please exhibit a profile of said section at the time the plaintiff began work thereon, and again when he ceased work thereon, and give a detailed statement of what he did, and what payments were made him therefor. Then also state what force of men he had on the work when same was taken from him; whether plaintiff was building said work as rapidly as required by defendant; why taken from him; to whom let for completion; at what price, and how much was paid in all to such other party for so completing same; within what time such other party completed the work, and how much was done by such other party, etc.

10. What, if any, requirement do you know was made of the plaintiff as to completing the work on said section by any given

time? State all that you know on that subject, and also say whether such requirement or notice thereof was given the plaintiff at or before he began said work.

11. Who completed the work left unfinished by Owens on section 19?

12. What did it cost to complete said work? Give detailed statement of cost of clearing; also cost per yard for excavations, and also for embankments.

13. Give the character of work required to be done on section 19, what part of the work Owens did, and how the work done by him compared with the work that remained to be done. Which cost the most, that done by him or that which he neglected to do?

14. How much would the profits to a contractor have been on that part of section 19 which Owens did not complete under a contract identical with a copy of what purports to be a contract between Jno. T. Owens and Memphis and Vicksburg R. R. Co., by J. A. Moore, engineer, filed *and* Exhibit "A" hereto, supposing said work to have been done by the party having the contract as economically and with as little cost to the contractor as possible?

48 15. Who had the contract with the Memphis and Vicksburg R. R. Co. to do the work on section 19 of said road? File a copy of said contract as Exhibit "B" to your deposition, if in your possession.

16. How was it that the parties having said contract failed to do the work thereon?

17. How and by whom was the money paid for completion of said work on section 19?

Cross-interrogatories for Foley, a Witness Examined for Defendant.

1st. In whose employ are you at this time?

2nd. Do you know what particular instructions were given J. A. Moore in making contracts? If you say you know, state who gave them, and where were they given at; if in writing or not. If they were verbal, who was present when they were given?

3rd. Did not Owens go to work under contract which is filed as Exhibit "A"?

4th. Was not J. A. Moore the resident engineer in charge of the work on section 19 at the date when this contract was made, and did he not continue on said section for some time, and was he not there when said work or part of it was taken from Owens, the plaintiff?

5th. Were not estimates for work on section 19 given to Owens by the engineer of the defendant for work done under above contract, and were not these estimates paid to him by the company's agents?

6th. If you state any conversation with plaintiff took place between you, state when it was, where it was, and who was present. Be explicit.

7th. Can you, or do you, state of your own knowledge that any demand was made on plaintiff at any time to increase his force on

section 19? If so, who made it? Where was it made, and
49 when, and who was present?

8th. Do you not know that the portion of section 19 taken from Owens was taken away without any demand whatever for increased force being made on him?

9th. Do you not know that J. A. Moore, the resident engineer at the time when the work was taken away, stated publicly that Owens had been very badly treated by the defendant?

10. Do you not know that Owens was considered by J. A. Moore a good and reliable contractor, and that he stated publicly and to Owens that he was getting along better than any contractor had on his part of the line?

11. If in answer to 10, the direct question, you state that you know of any requirement made by plaintiff about this work, state who gave it. Was it in writing or verbal? If it was not given by Moore, state why it was given by another.

12. If you state the character of work done by Owens, state whether you do not know that this work was characterized by J. A. Moore, the company's engineer, as good and fully up to the contract.

13. If you state in answer to the 13 direct that Owens neglected to do any work, state when it was, particularly so as to locate it, and who reported the neglect. Was it done by Moore, the engineer in charge, and was it in writing?

14. If you state anything in answer to 14 direct question about supposed profits of contractor under the contract of Owens with defendant's engineer, Moore, state all the data on which your opinion is founded.

15. Do you know what the labor employed by Owens costs him; if so, how do you know?

15½. How long was it after the taking of part of section 19 from Owens before the cross-ties and steel was laid on it?

WHITE AND MORGAN,
For Plaintiff.

50 16. Where is J. A. Moore, the engineer, now, and where has he been employed during the last year?

WHITE AND MORGAN.

EXHIBIT "A."

Copy of Contract Sued On.

Articles of agreements between Jno. T. Owens and M. & V. R. R.

I Jno. T. Owens of the first part do hereby agree to do all the grading and clearing on what is known as section 19, according to instructions given by engineer in charge. M & V. R. R. of the second part agree to pay 20 cts. per yard for all excavations and 20 cts. per yard for all embankments and to pay $35.00 per acre for all clearing.

Time of Payment.

Ninety per cent. of total estimate given at the end of each month by the engineer in charge to be paid on the 12th of the following month and at the completion of contract the remaining ten per cent. shall be paid in full.

(Signed) JNO. T. OWENS.
MEMPHIS AND VICKSBURG RAILROAD.

July 26th, 1883.

Rec'd by J. A. Moore, resident engineer.

We waive formalities and agree for deposition to be taken without commissioners — any officers qualified by law for the duty.

WHITE AND MORGAN, *For Pl'ff.*

1. My name is Thomas Foley; age, 58 years; residence, Memphis, Tenn., and my business is contractor and railroad-builder.

2. I was connected with the work of construction — a portion of said railroad. Burke, Foley and McMahon had the contract for doing the earthwork and clearing of fifty miles of its line, including section 19. We were at work there during the first 8 months of the year 1883. H. C. Derrick, at Memphis, was division engineer. J. A. Moore was the resident engineer in charge of section 19 for a part of the time.

3. I do not know that said engineer had authority for making such contracts. Our contract was made with Mr. Edwards, vice-president. My opinion is that the engineers had no authority to make contracts. That was my understanding.

4. I know nothing whatever of Moore's authority to make such contracts.

5. No one, so far as I know, excepting Mr. Edwards, vice-president.

51 6. I know nothing of plaintiff Owens doing any work on said section except that I saw some convicts at work there one day and was told that they were Owens' convicts. I know nothing of his contract, nor when he was to complete his work, nor what it cost the road to finish it, nor whether his contract was forfeited or not.

7. I have had no such conversation or correspondence.

8. I know nothing as to such matters.

9. I have none of the papers asked for in this question, and cannot make any answer to either of its paragraphs.

10. I know nothing whatever of the said injury in this interrogatory.

11. I do not know.

12. I cannot tell.

13. I cannot make any answer to this question.

14. My firm sublet this section 19 to Dugan and Conway at 18 cts. per yard, but they abandoned the work and left it unfinished. Had they remained and finished it according to contract, our profits

would have been 2 cts. per yard. Whether Dugan and Conway would have made anything or not I cannot say, and more than this, I cannot give any estimates upon the profits of working said section.

15. I will examine my papers this afternoon. I think I have said contract; if I can find it, I will file it herewith.

16. Dugan and Conway, through neglect, abandoned it; they claim to me that they were not making money.

17. I do not know.

X 1. I am doing business on my own account in Memphis. I am not in the employ of the defendant or any other railroad company.

X 2. I know — at all about instructions to said Moore.

X 3. Saw none that I know of.

X 4. He was on section 19 during that part of the year 1883; whether he had charge of it on 26th July or whether it was then in charge of Mr. Webb as engineer I cannot say.

X 5. I do not know.

X 6. I had no such conversation.

52 X 7. I do not know anything of such demand.

X 8. I know nothing of such matter.

X 9. I do not.

X 10. I do not.

X 11. I know nothing at all about this matter.

X 12. I know nothing at all of this matter.

X 13. I know nothing at all of this matter.

X 14. I have given all my data in my answer.

X 15. I do not know.

X 16. I do not know when it was taken from Owens.

X 17. I hear that he is — east Tenn.

The foregoing are my answers to direct and cross interrogatories in suit of J. T. Owens *vs.* M. & V. R. R. Co., in circuit court of De Soto Co., Miss., hereto attached.

THOMAS FOLEY.

Sworn to and subscribed before me 17th M'ch, 1885.

HUNSDON CARY,
Commissioner State of Miss. in Tennessee.

STATE OF TENNESSEE, }
County of Shelby. }

I, Hunsdon Cary, a commissioner for the State of Miss., at Memphis, in said county and State, do hereby certify that the foregoing deposition of Thomas Foley, together with the contract hereto attached, which is the paper referred to in his answer — 15 direct interrogatory, were this day produced to me by the witness Thos. Foley, who thereupon signed said deposition in my presence and swore to the same before me as his deposition in this cause.

Witness my hand and seal this 17th day of March, 1885.

HUNSDON CARY,
Com'r for Miss. in Tenn.

These articles of agreement made and concluded this 18th day of December in the year of our Lord one thousand eight hundred and eighty-two, and between C. C. Burke & Thomas Foley and Michel McMahon under firm name of Burke, Foley and McMahon of the first part and the New Orleans Baton Rouge Vicksburg and
53 Memphis R. R. Co. of the second part, witnesseth: That for and in consideration of the payments and *conveyants* hereinafter mentioned to be made and performed by the said railroad company the said parties of the first part do hereby covenant and agree to construct and finish, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the engineer in charge of the same, all the graduation as included in specifications under said general head as below given on fifty miles of said railroad commencing at section 16 south of Memphis, and embracing fifty miles next south and such other work as may be necessary to complete said graduation in accordance with the following specifications, so far as they may be applicable; and agreeably to the directions of said engineer in charge of said work, given from time to time during the progress thereof and to complete the same in or before the 1st day of July 1883 it being expressly agreed that the time herein stipulated shall be of the — of this contract.

Specifications.

Under this general heading will include clearing and grubbing, excavations and embankments, required for formation of rock-bed, turnouts, and depot grounds, foundations for masonry and trestle-work, or in any way connected with or incident to the construction or drainage of the same, or the change or crossing of roads or streams.

I. Clearing and grubbing.—Grubbing will be required the entire width of the road-bed in all excavations and embankments which are two feet or less in depth; also, in all slopes when the safety of the road requires it.

The clearing shall be made on the entire length of the road wherever required, and shall not be less than one hundred (100) feet in width on the regular road-bed and as much more as in the opinion of the engineer will be required for the safety or convenience of the road. The ground on which the embankments and excavations are made shall be cleared of all vegetable and perishable matter. All stumps must be cut close to the surface and none left within two feet of the grade in embankments, fences buildings timber and wood on the property of the railway or the land-owner. If not removed by the owner within a reasonable time they shall be cleared off by the contractor, piled up, and preserved for the use of the owner or railway, without charge. The clearing and grubbing shall be paid for per acree on the area actually covered by timber.
54 II. Width of roadway.—The road will be graded eighteen (18) feet wide in excavation, and fourteen (14) feet wide in embankment, except when otherwise ordered by the engineer in charge.

III. Slope.—The slopes of excavation shall be generally three-fourths horizontal to one vertical, and of embankments one and one-half horizontal to one vertical. These are, however, subject to such modifications as the engineer may direct. All slopes shall be made true and even.

IV. Ditching.—Whenever required by the engineer, ditches shall be cut beyond the slope of both excavation and embankment, of such location and dimension as he may direct.

V. Excavations.—Excavation shall include all material taken from cuts ditches channels for creeks, road crossings not under water. The classification of excavation shall be as follows:

Earth.—Earth will include clay, sand, gravel, loam, hard pan, decomposed rock and slate, stones and boulders containing less than one cubic foot, and all other material of an earthy kind.

Loose rock.—Loose rock will include all stone and detached rock, found in separate masses, containing not less than one cubic foot, nor more than one cubic yard; also, all slate *are* other rock, soft or loose enough to be removed without blasting, although blasting may be resorted to.

Solid rock.—Solid rock will include all rock in masses of over one cubic yard, which cannot be removed without blasting.

VI. Embankments.—The embankments to be formed fourteen (14) feet wide on top, unless otherwise directed, with slopes one and one-half horizontal to one vertical. Whenever the embankment is formed from borrow pits, or ditching on either side, such borrow pits and ditching and the crest of the slopes thereof shall in no case approach within six (6) feet nor within double the depth of the ditch of the foot of the proper embankment slopes. Whenever water-courses or new channel for rivers require to be formed they shall be put at such distance from the foot of the slope as the engineer may direct. Care must be taken to exclude all perishable material from embankments. Embankments shall be built according to instructions from the engineer, either by
55 dumping from grade, or in layers of such thickness as he may require. Such additional height above grade usually one-tenth of the amount of the fill shall be given to the embankments as the engineer may deem necessary to compensate for shrinkage. Embankments about masonry shall be built at such time *as* in such manner and of such material as the engineer may direct. Embankments shall be riprapped with stone, or otherwise protected against damage by water-courses, by turning the stream or making a new channel if required.

VIII. Trestle-work.—Trestle-work will be built of good sound yellow pine or cypress as directed by the engineer, and to be either piled or framed as per plan and specifications furnished by him. Trestle-work will be paid for per lineal foot, and the price paid will include all bolts, washers, spikes *are* other material necessary to complete it as per plan furnished.

General conditions applicable to all work.

The railroad company reserves the right to make any change in the alignment or grades of its road or of the plans of its work; provided however that the contractor shall be paid at the contract price for the work actually done before changing, and also, for the additional work embraced in the change. The monthly estimate of the engineer shall be subject to correction by him — any subsequent or monthly or final estimate. The monthly estimate *estimate* merely being made out as a basis of payment on account, it will necessar-y be only approximately correct as to quantity and value, pains being taken however to make them as accurate as possible.

The contractor shall render and account monthly, through the proper super-tending engineer, of any work he *he* may have been authorized to do; and to prevent disputes hereafter, it is hereby understood, that no bills for extra work will be allowed without sufficient evidence of the work having been properly authorized, and of the bills having been examined and approved by the engineer. All materials used in the construction of the road will be subject to the inspection and acceptance of the engineer, who will submit them to such tests as he may desire.

Commodious passing places for public and private roads shall be made and kept in good condition by the contractor;
56 and he shall provide and maintain sufficient fences for keeping up inclosures and the preservation of crops. The contractor will be held responsible for trespass or damage to the adjacent properties or the public for any acts or omissions on the part of himself or his employees. Any parties under the direction of the engineer shall be permitted to pass or haul any material required for the road over any section, such persons not interfering with the work of the contractor. Right of way and necessary lands for borrow pits, spoil banks, channels, ditches and roads etc. will be provided by the railroad company as early as practicable; but they are not to be held responsible for any delay caused by legal proceedings beyond their control. Contractors must carefully preserve bench marks and stakes, in case of neglect they will be charged accordingly. Falls and slips, if not occasioned by the negligence of the contractor, are to be paid for the same as the regular classification.

The contractors must take all risks from floods and casualties of every description, and shall make no charges for detention from such causes. The quantities marked on the profile are in approximation, and will not govern the final estimate. Disorderly and quarrelsome persons must be discharged by the contractor if in the opinion of the engineer the good of the road requires it. Contractors will not themselves, nor by their agents, give or sell any ardent spirits to their workmen, or any person at or near the line of railway; nor allow any to be brought on the works by their laborers or any other persons, and will do all in their power to discountenance their use in the vicinity of the work by persons in their employ; and they will not allow any person in their employ to commit tres-

pass on the premises of persons in the vicinity of the works, and will forthwith at the request of the engineer discharge from their employ any that may be guilty of committing damage in this respect. Contractors must satisfy themselves of the nature of the soil of the general forms of the surface of the ground, of the quantity of materials required for forming the embankments or other work, and all matters which can in any way influence their contract; and no information upon any such matters *the* derivered from the maps, plans, profiles, drawings, or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks or from fulfilling all the terms of this contract.

57 The contractor- will remove at their own expense, any materials disapproved by the engineers, and will remove and re-execute any works, without extra charge, and within such time as fixed by the engineer, appearing to him during the progress and within twelve months after completion, to be unsoundly or improperly executed, notwithstanding and certificate as to the due execution of the same. On their default such work will be done by the railroad company at the contractor'- expense. The contractor shall give personal attention to the work.

The engineer shall have power to direct the application of force to any portion of the work which in his judgment requires it and to order the increase or diminution of force at any point he may indicate.

Now therefore this agreement further witnesseth, that the party of the second — agrees to pay *are* cause to be paid at its office at Vicksburg, to the party of the first part for the faithful performance of the work embraced in this contract the following prices to wit:

For earth excavation per cubic yard, twenty (20) cents.
For solid-rock excavation per cubic yard, one (1) dollar.
For loose-rock excavation per cubic yard, fifty (50) cents.
For embankment per cubic yard, twenty (20) cents.
For grubbing and clearing per acree, thirty (35) dollars.
For pile and trestle per lineal foot ——.
For frame trestle per lineal foot ——.
For extra work not specified cost and ten (10) per cent.

The above payments shall be made in the following manner during the progress of the work and until it is completed, there shall be monthly estimates made by the engineer in charge of the quantity character, and value of the work done during the proceeding month, or since the last monthly estimate ninety per cent. of which value shall be paid by the party of the second part to the party of the first part, between the 10th and 15th of the following month; and when the whole work is completed under this contract, then the party of the first part shall be entitled to the final estimate of his work, and shall be paid in full for all work done, upon his signing a full release to the party of the second part from all claims or demands whatsoever, growing in any manner out of this agreement.

58 It is further agreed and understood, that the party of the first part shall be entitled to no damages from delays which may be occasioned by the party of the second part, but for such delays a reasonable extension of the time for the completion of this contract shall be made provided however that written demand for such extension be made by the party of the first part, at the time such delay was occasioned. This agreement further witnesseth, that should the party of the first part not begin the work herein contracted for, at the specified time, or after beginning it should the work be stopped or not prosecuted with such force and dispatch as, in the opinion of the engineer, is requisite for its completion within the time specified, then the party of the second part may give notice to the party of the first part either in person, or by his agent, or by posting in — co-picious place upon the work, to put the necessary force upon the work at once, and if the same has not been done within ten days after such notice has been given or posted, then the party of the second part shall have the right to declare this contract forfeited and may proceed to relet the work herein specified at such prices as may be necessary for its completion within the time specified in this contract, and thereupon the party of the second part shall have the right to appropriate all unpaid estimates *the* reservations from monthly estimates in its hands or so much thereof as may be necessary to the payment of the increased price, if any, at which it may be necessary for the company to relet said work, in order that it may be finished in the time specified herein, and all damages *in* which the party of the second part may have sustained by reason of the default or failure of the party of the first part; and if said unpaid estimates and reservations are not sufficient to make such payments, then the party of *of* the second part shall have the right to proceed against and recover*y* of the party of the first part and his guarantors the amount necessary to cover such balance.

In witness whereof the parties of the first and second parts have hereunto set their hands and seals this 18th day of December, 1882.

Executed in du*b*licate.

The erasure made in section seven before signing.

C. C. BURKE. [SEAL.]

59 THOMAS FOLEY. [SEAL.]

—— McMAHON. [SEAL.]

THE NEW ORLEANS, BATON ROUGE, VICKSBURG AND MEMPHIS R. R. CO., [SEAL.]

By JAS. M. EDWARDS, [SEAL.]

Vice-President & General Manager.

For value received, we hereby guarantee *of* the foregoing contract on the part of the party of the first part, and bind ourselves to pay to the party of the second part all damages it may suffer by reason of any default or failure on the part of the party of the first

part in the performance of their obligation and undertaking the said contract to the amount of ten thousand (10,000) dollars.

JOHN JOHNSON.
WILLIAM H. CARROLL.
CASEY YOUNG.
S. DREYFUS.

Filed March 18th, 1885.
T. R. MAXWELL, *Clerk.*

Defendant then introduced and read to the jury the depositions and exhibits thereto of F. L. Williford and John Armistead, in words and figures as follows, to wit:

Commission to Take Deposition.

The State of Mississippi to M. B. Trevant or Hun-don Carey, commissioners for Miss., Memphis, Tenn., Greeting:

Know we that we, —— ——, reposing especial confidence in your fidelity and circumspection in diligently examining F. L. Williford and John Armistead, witnesses in suit now pending in our circuit court of De Soto county, wherein John T. Owens — plaintiff and M. & V. R. R. Co. def't, do empower you or either of you, at such time and place as you shall appoint, to call and cause to come before you the witnesses aforesaid, and them diligently to examine on oath touching the premises to the interrogatories and cross-interrogatories hereto attached, and their examination when made you shall send into our said court without delay, under your hand and seal, returning also this writ.

Witness my hand and the seal of said court, at my office, in Hernando, the 4th day of August, A. D. 1885.

T. R. MAXWELL, *Cl'k.*

In the Circuit Court of De Soto County, State of Miss.

JOHN T. OWENS
vs.
MEMPHIS AND VICKSBURG R. R. Co.

Interrogatories propounded by defendant railroad company to F. L. WILLIFORD and JOHN ARMISTEAD, who — residents of Memphis, State of Tenn., for the purpose of taking their depositions on behalf of defendant on the trial hereof, viz:

1. What is your name, your age, your residence, and your business?

2. Are you acquainted with the plaintiff, Jno. T. Owens? If so, say how long you have known him.

3. Were you in any way connected with the house of Dillard, Armistead and Lundee, doing business in Memphis, Tenn., during the year A. D. 1883? If so, say in what way, and then whether

the plaintiff Owens did business with that house during the year 1883.

4. State whether about the six- of August, 1883, and 1st of September, 1883, the plaintiff sent to said house of Dillard, Armistead and Lundee any estimates of work done by him on defendant's line of road or any orders for said house to collect pay for such work; and if you say he did and you can, please file as a part of your answer such estimates and orders and state all you know about the same.

5. Did said house of Dillard, Armistead and Lundee collect any monies on such orders from the plaintiff? If so, please say how. If paid in checks and you have such checks, please file same with your answer.

6. Did you have any communication with defendant's engineer, H. C. Derrick, about said orders from plaintiff for said work? Did you demand payment thereof from him? If so, please tell all he said to you about payment thereof.

WATSON AND CUMMINS,
For Defendant.

Cross-interrogatories for F. L. Williford — Jno. Armistead.

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JNO. T. OWENS
vs.
M. & V. R. R. Co.

1. Did you have in your possession the contract for work on section 19 made by Jno. T. Owens and the defendant?

2. Did not you *are* one of you go with Jno. T. Owens to see Mr. Derrick, the chief engineer of defendant, and did you not show him the contract above mentioned?

3rd. Was any objection made by Derrick to the contract because it was made in name of defendants and Owens?

4. Did you not transact the business with Derrick in collecting for Owens the money earned under that contract?

5. Were you ever informed by Derrick that he was acting for Burke, Foley and Co., and not for the R. R.?

6. In all your dealings with Derrick did you not understand that you were dealing with the railroad as a party to that contract?

7. From whom did you receive pay for the estimates given by J. A. Moore, and in whose name were they given?

8. In what shape was the pay for the estimates given to you, and by whom signed?

9. Did you notice at the time by whom the checks w-re signed and what explanation was given you as to there being so signed?

10. Did you not in all your dealings suppose you were dealing with the M. & V. R. R. Co.?

11. Was not Derrick in the employ of the company, and acting for them in having this work done?

12. State anything you may know that will benefit plaintiff.

WHITE AND MORGAN,
For Plaintiff.

Filed July 20th, 1885.
T. R. MAXWELL, *Clerk.*

Answers of F. A. Williford and Jno. Armistead to the interrogatories hereto attached in the case of Jno. T. Owens *vs.* Memphis and Vicksburg R. R. Co., in the circuit court of De Soto county, Mississippi, viz:

Said witness, JOHN ARMISTEAD, being duly sworn, said:

62 1. My name is John Armistead. I am forty years old. I live at Memphis, in Tennessee, and my business is cotton factor and commission merchant, being a member of the firm of Armistead and Lundee, successors to Dillard and Armistead and Lundee, both of Memphis.

2. I know plaintiff, Jno. T. Owens; have known him for twelve years.

3. I was a member of said firm of Dillard, Armistead and Lundee during the entire year 1883, and plaintiff, Jno. T. Owens, did some business with us that year.

4. Yes; I attach hereto, as Exhibit "A" and "B," two letters that we received from plaintiff Owens, one dated the 6th of August, the other the 1st of Sept., 1883, and which we received about those dates. I also attach here, as Exhibit "C" and "D," the statements mentioned in said letters, both being estimates for work done on defendant's road, one amounting to $508.50, the other to $857.43; both of which we collected, receiving on the latter $1,009.20, and credited each to the plaintiff on his account with our firm.

5. Yes; our firm collected $508.50 on the 13th of August, 1883, on the first estimate, and $1,009.20 on the 15th of September, 1883, on the last estimate. Mr. Williford, then in our employ, made the collections, and two checks are exhibited with his deposition, which I believe to be the same on which these monies were paid us, although I cannot state positively as to that. Those checks are drawn by Foley and McMahon on the Bank of Commerce of this city, of the dates and amounts above stated, payable to Jno. T. Owens or bearer.

6. I went to see Mr. Derrick several times about the matter before getting the money. He always said that it would be paid as soon as he got the money; that the railroad company did not owe it, but he would get it from Foley and McMahon. He afterwards paid us $508.50 and $1,009.20, and this money, I am confident, was drawn on the checks exhibited in Mr. Williford's depositions. This was all the money ever paid us for Owens for work done on the road.

Cross-interrogatories—Answers to.

1. We did not, that I remember. I never saw any contract.
2. I remember being there once with Owens, but do not remember his having any contract.
3. As above stated, I do not remember seeing or hearing anything said about a contract.

63 4. Our firm collected some money for Owens, as above stated. Whether the money was paid under a contract or not or who the contract was made with, if there was any, I do not know.

5. I do not remember his stating that, but all the money we got from him was the Foley and McMahon drafts, as stated in direct examination.

6. There was no understanding of that kind, because I do not remember to have seen or had anything to do with the contract referred to.

7. We received pay in checks drawn by Foley and McMahon, as above stated. The estimates were in Mr. Owens' name.

8. The checks exhibited with Mr. Williford'- deposition.

9. I did not see the checks before they were collected.

10. Our transactions were with Owens and Derrick; don't know that I ever thought about who he represented. All I was interested in was getting the money.

11. I don't know about that. He was representing the railroad Co. at this place, as I understood. Whether he represented any other party or parties I do not know, nor do I know anything about how this work was done — for whom.

12. I know of nothing else.

And further deponent saith not.

JOHN ARMISTEAD.

Subscribed and sworn to before me this 14th day of September, 1885.

HUNSDON CAREY,
Com. for Miss. in Tenn.

Answers for said Witness, F. L. Williford, to the Direct Examination.

1. My name is F. L. Williford; I am thirty-one years of age; I reside in Memphis, Tenn., and am a salesman in the house of Fulmer, Thornton and Co., of this place.

2. Yes; I know the plaintiff; have known him for five years.

3. I was employed by Dillard, Armistead & Lundee during 1883 as clerk and book-keeper. Plaintiff was a customer of that firm that year.

4. I remember our having some estimates for work done for plaintiff on defendants R. R. Co.'- road during that summer or fall, and suppose the papers exhibited with Mr. Armistead's answers are

those. I collected these monies for our house in checks handed me either by Mr. Derrick or some one in his office.

64 5. Yes; we collected the monies thereon as I have stated above. They were paid me in two checks drawn by Foley and McMahon on the Bank of Commerce, this city—one for $508.50 on the 13 of August, 1883, the other for $1,009.20 on the 15th of Sept., 1883—and I *and I* attached said checks hereto as Exhibits "E" and "F." The receipts that I gave for these monies are on the estimates attached to Mr. Armistead's deposition above.

6. I do not remember any.

Answers of said F. L. Williford to the Cross-interrogatories Attached.

1. No, sir; I never saw any contract.
2. I never went with Owens to see Derrick, that I remember.
3. Not that I know of; I do not know anything about the contract.
4. I received the checks from Derrick. That was the only connection I had with the transaction.
5. No, sir; he said nothing about it one way or the other.
6. No, sir; I did not understand it that way. I did not reco-nize the railroad in it at all.
7. The two checks exhibited with this deposition is all that I ever received.
8. In checks, as before stated, signed by Foley and McMahon.
9. I noticed the checks were signed by Foley and McMahon. No explanation was asked or given.
10. No; I did not know that I was.
11. I don't know about that.
12. I don't know anything else.

FRANK L. WILLIFORD.

Subscribed and sworn to before me this September 14th, 1885.

HUNSDON CAREY,
Com'r for Miss. in Tenn.

STATE OF TENNESSEE, }
Shelby County. }

I, Hunsdon Carey, a commission- for the State of Mississippi, at Memphis, in the county and State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing deposition of Jno. Armistead and Frank L. Williford were produced to me on this 14th day of September by the witnesses and were by them respectively signed and sworn to before me as their deposition-

65 in this case, and I further certify that said depositions have not been out of my possession or altered since they were so signed and sworn to before me.

Witness my hand and seal this 14th day of September, 1885.

HUNSDON CAREY,
Com'r for Miss. at Tenn.

EXHIBIT "E" TO F. L. WILLIFIRD'- DEPOSITION.

MEMPHIS, TENN., *Aug. 15th*, 1883.

Bank of Commerce.

Pay to Jno. T. Owens or bearer five hundred and eight .50 dollars ($508.50).

FOLEY AND McMAHON.

EXHIBIT "C" TO JOHN ARMISTEAD'S DEPOSITION.

M. & V. R. R., 3rd residency.

Estimate of Work Done in July, Done by Jno. T. Owens.

Sec. 19.

Cu. yds.		
1,000,	earth excavation, 20 cts	$200.00
1,300,	earth embankment, 20 cts	260.00
3 acres	clearing, $35.00	105.00
	Total work to date	$565.00
	Provision estimates	$00.00
	Work for July	565.00
	10 per cent. reservation	56.50
	Remainder	$508.05

O K.
J. A. MOORE, *R. E.*

Received the above amount.

DILLARD, ARMISTEAD AND LUNDEE,
For Jno. T. Owens.

Aug. 14th, 1883.

EXHIBIT "A" TO ARMISTEAD'S DEPOSITION.

HERNANDO, MISS., *Aug. 6th*, 1883.

Messrs. Dillard, Armistead and Lundee, Memphis, Tenn.

GENTLEMEN: Enclosed please — a statement for $508.50 *dollars* on Col. H. C. Derrick, div. eng. of M. & V. R. R. Co., 338 Union street, which you will please collect and place to my credit and oblige—

66 Yours respect-ly, JNO. T. OWENS.

EXHIBIT "D" TO JNO. ARMISTEAD'S DEPOSITION.

Burke, Foley and McMahon.

M. & V. R. R. Co., 3rd Residency.

Copy of Jno. T. Owens, Aug., 1883.

Cubic yards, sec. 19, 2,587, earth excavations, 20 cts.....	$517.40
4,403, earth embankment, 20 cts.....	880.60
3.42 acres clearing, $35.00.....	119.70
Total to date.....	1,517.70
Deduct provision estimate.....	565.00
Estimate in Aug.....	952.70
10 per cent. reservation.....	95.27
Amount due.....	857.43
	151.77

O K.
J. A. MOORE, *R. E.*

Received one thousand nine .20 dollars in full of above amount.
1,009.20. DILLARD, ARMISTEAD AND LUNDEE.
WILLIFORD.

EXHIBIT "B" TO ARMISTEAD'- DEPOSITION.

LAMB'S LANDING, MISS., *Sept. 17th*, 1883.

Messrs. Dillard, Armistead & Lunde-, Memphis, Tenn.

GENTLEMAN: Enclosed please find statement of work done in August which you will please collect and place to my credit, and oblige—

Yours respectively, JOHN T. OWENS.

EXHIBIT "F" TO F. L. WILLIFORD'- DEPOSITION.

MEMPHIS, TENN., *Sept. 15th*, 1883.

Bank of Commerce.

Pay to Jno T. Owens or bearer (for work done on section 19, final) one thousand and nine .20 dollars.
$1,009.20. FOLEY AND McMAHON.

67 Filed Sept. 16th, 1885.
T. R. MAXWELL, *Clerk.*

This was all the evidence for both plaintiff and defendant; and thereupon the court instructed the jury for the plaintiff and at the request of plaintiff as follows, to wit:

Plaintiff's Charges.

If the jury believe from the evidence that the contract was made with Owens by a duly authorized agent of the M. & V. R. R. Co., and that a portion of the contract was excepted and confirmed, then the remainder of the contract should not have been rejected in the absence of good cause.

Given by the court:

A. T. ROANE, *Judge.*

2. An agent who had the power to appoint a subagent may ratify his act and make it binding on the agent principal.

Given by the court:

A. T. ROANE, *Judge.*

3. If the jury believe from the evidence that Derrick had authority to make such contracts for defendant, or that — ever held out to the public as having authority to execute such contracts by defendant, and the contract sued on was made by Moore, then submitted to him by plaintiff, and he knowingly acted thereon, then defendant is bound thereby and plaintiffs entitled to recover the damages actually sustained by him on account of a breach of contract.

Given by the court:

T. R. MAXWELL, *Clerk.*

4. The principal is bound by the acts of his agent performed in the scope of his authority, and this may be either express or implied in determining the authority of the agent to bind his principal in a given case. They may look to the nature and character — his employment, and if the act done was proper or necessary to the proper transaction of the business confided to him, then the
68 agent had authority to do it, and his act will bind the principal; and the jury are instructed that whenever any peculiar business is confided to the management of and agent, then the law implies that he sha l have power to do everything proper or necessary to accomplish he purpose of the agency; and if the jury believe that Derrick ad general authority from defendant to have this work done on section 19, and that the contract sued on was proper and necessary to have this work done, then Derrick had authority to make such a contract; and if the one sued on was made and submitted to him and a-quiesced in by him, then the defendant is bound thereby.

Given by the court:

T. R. MAXWELL, *Clerk.*

5. The jury are instructed that when a contract is for personal services the damages *is* governed by the conduct of the party unlawfully deprived of his contract, but when it's for breach of a general contract to be done not by his own services, but by labor generally,

then — rule is different, and in the first case the employee must get employment if he can; in case of a contract, as in the last case, then the damage the party is entitled to recover is the actual damage sustained by plaintiff resulting from the breach of *j*is contract by defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

To which action of the court in so instructing the jury defendant at the time excepted, and the court instructed the jury for the defendant as follows:

The burden of proof is upon plaintiff to establish to the satisfaction of the jury by a predonderance of testimony the following propositions:

1. That there was a contract made by plaintiff and the defendant, or some agent of defendant duly authorized to make the contract, by the terms of which the plaintiff was to do the work here sued for, or that a contract was made on behalf of defendant and they ratified it with a knowledge of its stipulations.

2. That plaintiff was prohibited by defendant and prevented from doing said work.

3. That by such prohibition and prevention plaintiff lost money.

4. The amount of such loss; and if the evidence fails to satisfy the jury as to any one of said propositions they must find for the defendant.

2. If the jury believe from the evidence that that portion of the railroad between Vicksburg and Memphis, in which is in-
69 cluded section 19, was built by the New Orleans, Vicksburg and Memphis Railroad Co., and that the Memphis and Vicksburg Railroad Co. had nothing to do with the construction of said railroad and did not contract with the plaintiff nor ratify the contract relied on by plaintiff to do work on said railroad, they will find for the defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

—. Those who deal with an agent must know the extent of the delegated power, for the act done will be valid or not as it conforms to the measure of authority confided to him.

70 4. When one person deals with another, knowing that the other is acting under delegated authority, it is his own folly if he does not inform himself of the extent of the delegated authority. In such case the principal is bound only to the extent of that authority. Where a party relies on the ratification of an unauthorized contract, made by an agent without authority to make such contract, by the principal of such agent, he must show that such principal had full knowledge of the terms of such contract.

Given by the court:

T. R. MAXWELL, *Clk.*

5. More payments made by defendant for work done would not alone be a ratification of the contract relied on, unless the defendant, through its proper officers, was informed of the contract.

Given by the court:

T. R. MAXWELL, *Cl'k.*

6. If the jury believe from the evidence that the contract with Owens was made by an agent of the defendant, authorized to make the contract, and that the work to be performed by Owens was situated partly south of a trestle of the railroad between Vicksburg and Memphis and partly north of said trestle, and that the work on said north side was harder to do and cost contractors more to do than the work on the south side of said trestle, then the jury will take this fact into consideration in determining whether defendant was damaged by not completing the work on north side of said trestle.

Given by the court:

T. R. MAXWELL, *Clerk.*

71 7. If the jury believe from the evidence that plaintiff had a contract with the defendant, made by an agent who had authority to make such contract, and that the defendant, without justifiable cause, prohibited or prevented defendant from completing the work that he had contracted to do, the jury will assess against the defendant and in favor of plaintiff only such damages as the evidence shows that defendant actually sustains. Such damages, if any were sustained, the jury must arrive at from the evidence and not from conjecture, guess, or surmise. The just claims of a party employed to do labor or service are satisfied when he is recompensed for the part performed and indemnified for his loss in respect to the part unexecuted. If in this case the evidence shows that plaintiff was paid for all the work done by him, he can recover nothing, unless the evidence shows that he lost money by not being allowed to complete the work, and amount of this loss must be established by the evidence, and if the evidence fails to show any loss to plaintiff on account of not having completed said work, the jury will find for defendant.

Given by the court:

T. R. MAXWELL, *Clerk.*

8. If the evidence satisfies the jury that the contract sued on was made by the agent of defendant, duly authorized to make such a contract, and that under the terms of such contract plaintiff had the right to do the work north of the trestle, but the evidence further satisfies the jury that there would have been a loss instead of a profit to plaintiff if he had done the work north of the trestle on section 19 at the prices agreed on, the jury must find for the defendant.

Given:

A. T. ROANE, *Judge.*

9. If the evidence fails to show that there would have been any profit to plaintiff in doing the work north of the trestle on section 19 at the prices agreed on in the contract, relied on by plaintiff, they will find for the defendant.

Given:

A. T. ROANE, *Judge.*

72 10. The burden of proof is upon the plaintiff to satisfy the jury by a preponderance of testimony that there would have been profit to the plaintiff in doing the work north of the trestle on section 19 at the prices agreed on in the contract relied on by plaintiff, and if he failed to show by a preponderance of testimony that there would have been a profit to plaintiff in doing such work, the jury must find for the defendant.

Given:

A. T. ROANE, *Judge.*

11. If the jury believe from the evidence that the plaintiff was prohibited by the defendant from building the railroad embankment north of the trestle, and that plaintiff had a contract with defendant to do said work, then after said prohibition it was the duty of plaintiff to seek other employment for himself and laborers employed to do such work if he claims damages on account of loss of time of self and laborers in his employment, and unless he has shown to the jury by the evidence that he was unable to find other employment, or that he was delayed in finding other employment by reason of being prevented from going on under his contract, or was compelled to take employment less profitable than under said contract, or was in some way actually damaged by a breach of said contract without any default of plaintiff's, then the jury will find for the defendant.

Given:

A. T. ROANE, *Judge.*

To all of which charges plaintiff objected *to*, and objection overruled; to which plaintiff *accepted*.

And thereupon the jury retired, and afterwards returned a verdict in words and figures as follows, to wit: "We, the jury, find for plaintiff $400.00, four hundred dollars;" and thereupon defendant moved the court to set aside the verdict of the jury and grant a new trial in words and figures as follows, to wit:

Motion for a New Trial.

J. L. COCKE, Adm'r*st* of J. T. Owens, Deceased, }
vs. }
M. & V. R. R. Co. }

73 Defendant, by attorney, moves the court to set aside the verdict of the jury and for a new trial in this cause:

1. Because the jury found contrary to the evidence.
2. Because the jury disregarded the instructions of the court.

3. Because the court erred in giving the charges asked by plaintiff.

4. Because the court erred in admitting testimony objected to by defendant.

MALONE AND WATSON, *For Def't.*

Which said motion was by the court overruled; to which action of the court in refusing to set aside the verdict of the jury and to grant a new trial defendant accepted and tendered this his bill of exception, and asked that the same be signed and made a part of the record, which is done.

In — whereof I have hereunto set my hand this 4th day of April, 1887.

A. T. ROANE, *Judge.*

Filed April 7th, 1887.
T. R. MAXWELL, *Clerk.*

JNO. L. COCKE, Adm'at'r of Jno. T. Owens,
vs.
MEMPHIS AND VICKSBURG RAILROAD COMPANY. } Petition for Appeal.

To T. R. Maxwell, clerk of the circuit court of De Soto Co.:

Defendant, The Memphis and Vicksburg Railroad Co., against whom a judgment was rendered in the above-styled cause at the March term of the circuit court of De Soto Co. for $400 and costs of said suit, brings on appeal to the supreme court this April 16th, 1887.

MALONE AND WATSON,
Att'ys for Defendant.

Filed April 16th, 1887.
T. R. MAXWELL, *Clerk.*

74 The State of Mississippi to the sheriff of De Soto county:

We command you to summon J. L. Cocke, administrator for Jno. T. Owens, deceased, or White and Witherspoon, his attorneys of record, to appear before the supreme court of Miss. on the 4th Monday in April, 1887, to defend the appeal of the Memphis and Vicksburg Railroad Co. against J. L. Cocke, administrator of Jno. T. Owens, deceased, said appeal having been taken from the judgement of $400 and cost of said suit, rendered by the circuit court of De Soto county at the March term — said court, in favor of said J. L. Cocke, administrator, and against the Memphis and Vicksburg Railroad Co. Herein fail not, and have you there and then this writ with your action thereon endorsed.

—— ——.

We accept service and enter our appearance in said cause.
WHITE AND MORGAN,
WITHERSPOON,
Pl'ff's Att'ys.

Summons in appeal.

J. L. COCKE, Adm'r of Jno. T. Owens, Deceased,
vs.
M. & V. R. R. Co.
} Appeal Bond.

We, the M. & V. R. R. Co., principal, and Holmes Cummins and H. C. Watson, sureties, acknowledge ourselves to be indebted to J. L. Cocke, administrator of Jno. T. Owens, deceased, in the sum of $800; to be void upon condition that we shall pay such judgement as the supreme court may render against said defendant in said above-styled cause and all costs that may be adjudged against said defendant by said supreme court; otherwise to remain — full force.

This April 16th, 1887.

M. & V. R. R. CO.
MALONE AND WATSON,
Its Attorneys.
H. C. WATSON, *Surety.*
HOLMES CUMMINS, *Surety,*
By H. C. WATSON.

Filed and approved April 16th, 1887.
T. R. MAXWELL, *Clerk.*

75 *Certificate of Clerk.*

J. L. COCKE, Administrator of Jno. T. Owens, Deceased,
vs.
M. & V. R. R. Co.

I, T. R. Maxwell, clerk of the circuit court of De Soto county, do hereby certify that the foregoing pages contain a true and perfect transcript of the record of the above-styled causes — the same appears of record in my office.

Witness my hand and seal this the 18th day of April, 1887.
[SEAL.] T. R. MAXWELL, *Clerk.*

Cl'k Maxwell, for transcript, $50.20.

76 Afterwards, on the 27th day of April, 1887, the appellant filed its assignment of errors in said supreme court in words and figures as follows, to wit:

In Supreme Court of Mississippi.

MEMPHIS & VICKSBURG R. R. Co.
vs.
J. L. COCK, Adm'r Jno. T. Owens.
} No. 5513.

Assignment of Errors.

Appellant, by att'y, comes and assigns for error:

1st. The court erred in admitting the answers of Cyrus & Geo. T. Smith to interrogatories Nos. 8, 9, 10, & 11, to be read to the jury

over the objection of appellant, and especially appellee's 1st, 2nd, 3rd, & 4th charges.

2nd. The court erred in giving instructions to the jury asked by appellee Owens.

3rd. The court erred in refusing to set aside the verdict of the jury and in refusing to grant appellant a new trial.

MALONE & WATSON,
Att'ys for Appellant.

Filed April 27, 1887.

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

Afterwards, on the 6th day of May, 1887, letter of agreement as — revivor in name of administrator was filed in said supreme court in the following words and figures, to wit:

MEMPHIS, TENN., *May 5th*, 1887.

COCKE
v.
M. & V. R. R. Co.

Oliver Clifton, Esq.:

Messrs. White & Witherspoon write us that the record in J. L. Cocke, adm'r of Jno. T. Owens, *vs.* Memphis & Vicksburg R. R. Co. fails to show that the suit was revived in the name of Cocke, adm'r. We agree that the suit was regularly revived, and that the court shall consider the cause as if the record — this fact.

Please file this agreement with the record in said cause.

MALONE & WATSON,
Att'ys for M. & V. R. R. Co.

5513. Filed May 6, 1887.

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

77 On the 2nd day of May, 1887, prior to the filing if the letter of agreement of revivor, the following entry was made upon the minutes of said supreme court, to wit:

MEMPHIS & VICKSBURG RAILROAD COMPANY
v.
J. L. COCK, Adm'r.
5513.

Submitted on briefs by Mess. Malone and Watson, for appellant, and Mess. White & Witherspoon, for appellee.

And on the 9th day of May, 1887, the same being a day of the regular April term, A. D. 1887, of the said supreme court, the following final judgment was rendered in said cause and entered on the minutes of said court, to wit:

MEMPHIS & VICKSBURG RAILROAD COMPANY
v.
J. L. COCK, Adm'r. } 5513.

This cause having been submitted on a former day of this term on the record herein from the circuit court of De Soto county, and this court, having sufficiently examined and considered the same and being of the opinion that there is error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the March term thereof, A. D. 1887, on the 29th day of March, 1887, be, and the same is hereby, reversed and cause remanded, and that the appellee pay the costs of this appeal to be taxed, &c.

I, E. W. Brown, clerk of the supreme court of the State of Mississippi, do hereby certify that the above and foregoing 76 pages contain a true and correct copy of the record, agreement as to revivor, proceedings, and judgment of and in said case No. 5513 in said supreme court, as fully as the same appears of record and on file in my office as said clerk, except the opinion of the court, which is not herein copied; but I further certify the opinion of said court in said case as reported in volume 64 of the Mississippi Reports, on
78 pages 713–717, inclusive, is a true and correct copy of said opinion.

Seal State of Mississippi Supreme Court.

Witness my hand and the seal of said court, affixed in my said office, at Jackson, Mississippi, this the 21st day of March, A. D. 1900.

E. W. BROWN, *Clerk.*

Clerk's transcript fee, $76.10.